IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Case No. 79-C862

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RAYMOND R. STONE,

Petitioner,

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-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TOPICAL INDEX

Page(s)

PRELIMINARY STATEMENT . . . . . 1 - 2

STATEMENT OF THE CASE . . . . . 3 - 4

REASONS FOR NOT GRANTING THE WRIT . . . . . 4 - 22

ISSUE I: THE FLORIDA SUPREME COURT, IN AFFIRMING THE IMPOSITION OF THE SENTENCE OF DEATH IN THE PRESENT CASE HAS NOT ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TERM "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION . . . . . 4 - 11

ISSUE II: THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE RELATING TO MURDERS COMMITTED "BY A PERSON UNDER SENTENCE OF IMPRISONMENT", TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY UNDER THE FACTS OF THIS CASE, DO NOT CONSTITUTE A VIOLATION OF PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION . . . . . .12 - 14

ISSUE III: THE IMPOSITION OF THE SENTENCE OF DEATH IN THIS CASE UPON THE GROUND THAT IT IS "PRESUMED TO BE THE PROPER SENTENCE" IS NOT TANTAMOUNT TO A MANDATORY DEATH SENTENCE AND THEREFORE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION . . . . . .15 - 16

ISSUE IV: PETITIONER'S PRE-TRIAL STATEMENT TO THE POLICE WAS NOT OBTAINED IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION . . . . . 17 - 22

CONCLUSION 22

CERTIFICATE OF SERVICE 23

TABLE OF CITATIONS

	PAGE(S)
Alvord v. State, 307 So. 2d 433 (Fla. 1975)	15
Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398 89 S.Ct. 1162	2, 5, 6
Cooper v. State, 336 So. 2d 1133(Fla. 1976)	7
Dixon v. State, 283 So. 2d 1 (Fla. 1973)	6 - 7, 9, 13
Fleming v. State, 374 So. 2d 954 (Fla. 1979)	6, 7
Ford v. State, 374 So. 2d 496 (Fla. 1979)	13
Foster v. State, 369 So. 2d 928 (Fla. 1979)	10
Godfrey v. Georgia, 64 L.Ed.2d 398 (1980)	4, 5, 6, 10, 11
Hargrave v. State, 366 So. 2d 1 (Fla. 1978)	10
LeDuc v. State, 365 So. 2d 149 (Fla. 1978)	15
Lewis v. State, 377 So. 2d 640 (Fla. 1979)	7 - 8
Lucas v. State, 376 So. 2d 1149 (Fla. 1979)	8, 9
Magill v. State, 383 So. 2d 901 (Fla. 1980)	9 - 10
State v. Dixon, 383 So. 2d 1 (Fla. 1973)	15
Menendez v. State, 368 So. 2d 1278 (Fla. 1979)	8
Miranda v. Arizona, 384 U.S. 436 (1966)	17, 20, 21, 22
Proffitt v. Florida, 428 U.S. 242 (1976)	4, 6, 9, 10
Purdy v. State, 343 So. 2d 4 (Fla. 1977)	8

Riley v. State,
366 So. 2d 19 (Fla. 1978) 8

Roberts v. Louisiana,
428 U.S. 325 (1976) 15

Salvatore v. State,
366 So. 2d 745 (Fla. 1978) 10, 11

Shue v. State,
336 So. 2d 387 (Fla. 1978) 8

Smith v. State,
365 So. 2d 701 (Fla. 1978) 10

Stone v. State,
378 So. 2d 765 (Fla. 1979) . . . . . 3 - 4, 12 - 13, 17 - 19

Stone v. Wainwright,
478 F.2d 390 (5th Cir. 1973) 12

Wainwright v. Sykes,
433 U.S. 72, 97 S.Ct. 2497,
53 L.Ed.2d 594 (1977) 6

Wainwright v. Stone,
414 U.S. 21 (1973) 12, 13, 14

Washington v. State,
362 So. 2d 658 (Fla. 1978) 10

Williams v. State,
___ So. 2d ___ (Fla. 1980)
25 Fla.L.Wk. 302 8

Woodson v. North Carolina,
428 U.S. 280 (1976) 15

STATUTES

Section 921.141, Florida Statutes 4

Section 921.141(5)(h), Florida Statutes 6, 10, 11, 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Case No. 79-

RAYMOND R. STONE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the citations to the Opinions Below, Jurisdiction, Questions Presented, Constitutional and Statutory Provisions Involved, found on pages 1 through 5 of the Petition. In accepting the Questions Presented, Respondent does not accept any assumptions of law contained in the points as set forth.

Respondent does not accept Petitioner's statement as to how the federal questions were raised and decided below. In particular, Respondent would urge, as to the first issue before the Court concerning whether the aggravating circumstance relating to murders which are particularly heinous, atrocious, and cruel, can be constitutionally applied to the Petitioner, that said issue was not presented to the Florida Supreme Court as challenged herein. While

the Florida Supreme Court affirmed the judgment and sentence below in the case at bar, the two-fold assertion in Issue I of Petitioner's Petition was never presented to the Florida Supreme Court for appellate review. See Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

While Issues II and IV of Petitioner's Petition were raised on appeal to the Florida Supreme Court, the federal constitutional questions tendered by Petitioner merely cloak meritless issues in federal constitutional robes.

Issue III assaults the decision rendered by the Court, specifically the language used in affirming the death sentence. Said claim is not well taken nor of such magnitude that would entitle Petitioner the relief sought, to-wit: the reduction of his capital sentence.

Attached hereto as part of Respondent's appendix to its Response are copies of the briefs filed by Petitioner's State appellate counsel to the Florida Supreme Court.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as set out by Petitioner in his Petition for Writ of Certiorari which are not argumentative and are supported by appropriate references to a trial record. Respondent would invite this Court to review the Statement of Facts as stated by the Florida Supreme Court in Stone v. State, 378 So. 2d 765 (Fla. 1979) and would submit the following:

> On August 22, 1974, the victim, Jacqueline Smith, reported for work at a General Electric plant. Her hours were from 3:30 p.m. until midnight. She did not return from work and, after searching for her, Marvin Smith, her husband, notified police authorities. Later in the morning her automobile was found parked in a field near their home.
>
> The defendant had been employed by the victim's husband in May 1974 to assist in the farming of his tobacco crop. At the time of the homicide defendant was staying with the Smiths in their home.
>
> On September 1, 1974, a body was found in the Santa Fe River approximately one-fourth mile west of a bridge. The neck region and the head were missing, as well as the upper left extremity. The hand and right upper extremity were also missing. Dr. L. F. Beamer, a pathologist, identified the torso as being that of the victim by virtue of a laminectomy scar and an abnormality of the twelth rib.
>
> The defendant was involved in an accident in Missouri when a truck collided with the rear of his vehicle. Defendant was hospitalized and, while in the hospital, Missouri police officials arrested him on August 31, 1974. Florida had lodged a detainer against him because the state won an appeal relating to an earlier criminal conviciton for sodoly and Florida officials wished to return him for the purpose of serving the remainder of his sentence.
>
> A Florida officer met defendant in Missouri on September 4, 1974, and returned him to Florida. He was taken to Leon County Jail, then to the Lake Butler Reception and Medical Center for further medical treatment. This medical center is a part of the prison system of Florida.
>
> Defendant was informed that he was a suspect

> in a murder case. Eventually defendant confessed, an indictment was returned, and, upon trial, defendant was found guilty of murder in the first degree. The sentence hearing resulted in a recommendation of death and the trial judge imposed the death sentence. This appeal resulted.

[Id. at 767 - 768]

Other facts relevant to a disposition of the Petition herein filed will be included in the argument portion of this pleading.

REASONS FOR NOT GRANTING THE WRIT

I.

THE FLORIDA SUPREME COURT, IN AFFIRMING THE IMPOSITION OF THE SENTENCE OF DEATH IN THE PRESENT CASE HAS NOT ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TERM "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner asserts in his first point on appeal that pursuant to this Court's decision in Godfrey v. Georgia, 64 L.Ed.2d 398 (1980) that the aggravating circumstance listed in § 921.141, F.S., is overbroad and therefore, as applied and in general, violates the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner asserts that as applied, the facts in the case at bar do not warrant a finding by the trial court that the killing herein was especially heinous, atrocious, and cruel. Further, Petitioner asserts that those decisions rendered after Proffitt v. Florida, 428 U.S. 242 (1976) wherein this particular subsection was challenged for vagueness and overbreadth, and held not to be vague or overbroad, have expanded the original definition of especially heinous, atrocious, and cruel to the extent that said aggravating circumstance is a

"catch-all" rather than an appropriate "specific" aggravating circumstance. Petitioner further asserts that the failure on the part of the Florida Supreme Court to make specific findings as to the reasons for finding the fact in a given case to be particularly heinous, atrocious, and cruel makes said findings imprecise and not based on "reasoned judgment" in the imposition of and the affirmation of a death sentence.

Respondent would respectfully urge that Petitioner has failed to present this current complaint to the Florida Supreme Court for appellate review. A review of the issues raised before the Florida Supreme Court reveals that albeit Petitioner challenged the correctness of imposing a capital sentence in this case, he did not challenge the finding by the trial court that this killing was especially heinous, atrocious, and cruel. While Petitioner would argue to this Court that the Godfrey v. Georgia, supra, decision is of recent vintage, Respondent would submit that Petitioner did amend his original direct appeal t the Florida Supreme Court with a specific challenge as to the finding by the trial court that the Petitioner committed the instant murder while under a term of imprisonment, and therefore could have presented this argument for review also. In Cardinale v. Louisiana, supra, this Court opined:

> In view of the Petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to Petitioner,. the writ is dismissed for want of jurisdiction.

[22 L.Ed.2d. at 401]

Respondent would submit that as to Issue I raised by Petitioner, the decision in Cardinale v. Louisiana, supra, controls. See Wainwright

v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

While Respondent relies totally on this Court's decision in Cardinale v. Louisiana, supra, and urges that as to the first issue raised this Court should not review that which has not been reviewed by the highest state court of Florida, Respondent would further contend that the complaint raised herein that Florida suffers under the same affliction as Georgia pursuant to Godfrey v. Georgia, supra, is erroneous. Petitioner acknowledges that the decision of this Court in Proffitt v. Florida, 428 U.S. 242 (1976) addressed the issue of vagueness and overbreadth regarding § 921.141(5)(h), F.S., but argues that since the Proffitt decision, the Florida Supreme Court has gone awry in its renditions regarding the finding that the especially heinous, atrocious, and cruel aggravating circumstance applies in a large number of the capital cases. A case-by-case review of the decisions rendered by the Florida Supreme Court reflects that the court, in determining the applicability of this particular aggravating circumstance, has not ventured into impermissible waters. Indeed, a review of a few of the state cases reveals that the directives set forth in Proffitt v. Florida, supra, at 49 L.Ed.2d 924 have been repeatedly applied in Florida. In Fleming v. State, 374 So. 2d 954 (Fla. 1979), the defendant therein contended that the trial court erred in designating that the crime was especially heinous, atrocious, and cruel, arguing that the killing of Deputy Yahl was no more shocking than a majority of murder cases reviewed by the Florida Supreme Court. The court agreed and citing to Dixon v. State, 283 So. 2d 1 (Fla. 1973) held:

> This case is not unlike *Cooper v. State*, 336 So. 2d 1133 (Fla.1976), wherein the victim was killed by two gunshots to the head. While affirming the death sentence, the court reversed the trial court's finding that the murder was especially heinous, atrocious, and cruel, reasoning that the victim "was killed instantaneously and painlessly, without additional facts which made the killing 'heinous' within the statutorily-announced 'aggravating' circumstance." (At 1141.)

> The evidence in this case shows that the murder was committed by a single shot, fired when the hostage grabbed appellant's gun. As human beings, we are appalled by such senseless killings. As judge's however, we must unemotionally apply the law to the facts. We therefore hold that the trial court erred in finding the murder in this case "especially heinous, atrocious, or cruel."

[374 So. 2d at 959]

As noted in Fleming v. State, supra, the Florida Supreme Court in Cooper v. State, 336 So. 2d 1133 at 1140 - 1141, held that:

> While we agree with the state that this execution-type murder may have been unnecessary, we agree with Cooper that the standard of an aggravating circumstance is whether the horror of murder is "accompanied by such additional acts as to set the crime apart from the norm . . . the conscienceless or pitiless crime which is unnecessarily torturous to victim." This murder was not in that category. Deputy Wilkerson was killed instantaneously and painlessly, without additional acts which make the killing "heinous" within the statutorily-announced "aggravating" circumstance.

[Id. at 1140 - 1141]

In Lewis v. State, 377 So. 2d 640 (Fla. 1979), the Florida Supreme Court held:

> The finding under section 921.141(5)(h) was predicated upon the fact that appellant shot the victim in the chest and, as the latter attempted to flee, shot him several more times in the back. In *State v. Dixon*, we held that "heinous" means "extremely wicked or shockingly evil." We then elucidated the acts which the legislature intended to come within the scope of that term:
>
> > What is intended to be included, are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. *Accord, Cooper v. State*, 336 So.2d 1133 (Fla.1976); *Tedder v. State*, 322 So.2d 908 (Fla.1975).

> It is apparent that all killings are heinous,-the members of our society have deemed the intentional and unjustifiable taking of a human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is "*especially* heinous"- "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." (Emphasis supplied.) The killing in the case at bar simply does not fall within that category when viewed within that context of the published decisions of this Court. *Cf. Barclay v. State*, 343 So.2d 1266 (Fla. 1977) (murder heinous in that victim was stabbed while begging for mercy and then killed by shots to the head); *Adams v. State*, 341 So.2d 765 (Fla.1977) (murder heinous in that victim was beaten with fire poker past point of submission and until grossly mangled).

[Id. at 646]

And in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), the Florida Supeme Court again reviewed the appropriateness of a trial court's finding that the killing was especially heinous, atrocious, and cruel, and concluded:

> It is clear that this murder was committed during the course of a robbery. It is not so clear that the murder was "especially" heinous, atrocious, or cruel, as is contemplated in the statute. The storekeeper was shot twice and died. Although his arms may have been in a submissive position at the time he was shot (a fact which is subject to other reasonable interpretations), there is nothing to set his execution "apart from the norm of capital felonies."

[Id. at 1282]

See, also, Shue v. State, 336 So. 2d 387 (Fla. 1978); Purdy v. State, 343 So. 2d 4 (Fla. 1977); Riley v. State, 366 So. 2d 19 (Fla. 1978); Lucas v. State, 376 So. 2d 1149 (Fla. 1979); and Williams v. State, ___ So. 2d ___ (Fla. 1980), 25 Fla.L.Wk. 302 at 304.

Indeed, the decision in Lucas v. State, supra, demonstrates clearly the extent to which the Florida Supreme Court has followed the standards noted in Dixon v. State, supra, and Proffitt v. State, supra:

> Appellant also attacks the trial court's finding as to the heinous and atrocious nature of the crime. In *State v. Dixon*, 283 So. 2d 1 (Fla. 1973) we defined "especially heinous, atrocious, or cruel" as follows:
>
> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifferance, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim. [At 9]
>
> We find that the record in this case supports the finding by the trial judge. The evidence shows (at least by one witness's version) that appellant shot the victim, pursued her into the house, struggled with her, hit her, dragged her from the house, and finally shot her to death while she begged for her life. However, the finding that the attempted murders of the victim's companions were heinous and atrocious is non-statutory aggravating factor and should not have been considered.

[376 So. 2d at 1153]

In Magill v. State, 383 So. 2d 901 (Fla. 1980), the Florida Supreme Court Court in upholding the propriety of the death sentence observed:

> The record shows that the victim was shot in the head and fell to the fround, agter which defendant deliberately shot her twice more, once in the head and once in the chest. The chest shot was at such close range that it left powder burns. The record is clear that defendant had a cold, calculated design to effect the death of the helpless victim. This is evident from the number of times

> defendant shot the victim with his .44 caliber pistol, the proximinty of the muzzle of the pistol to the victim's chest, and defendant's statement to the police that he shot her to avoid identification and made sure that she was dead. A cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder. *Alvord v. State*, supra, *Sullivan v. State*, 303 So.2d 632, 637 (Fla.1974).

[Id. at 904]

See, also, Foster v. State, 369 So. 2d 928 (Fla. 1979); Hargrave v. State, 366 So. 2d 1 (Fla. 1978); Smith v. State, 365 So. 2d 701 (Fla. 1978); and Washington v. State, 362 So. 2d 658 (Fla. 1978).

Respondent would urge that the prohibitive actions condemned by this Court in Godfrey v. Georgia, supra, wherein there was no meaningful basis for distinguishing the applicability of a comparable aggravating circumstance to § 921.141(5)(h), F.S., is not present in the renditions by the Florida Supreme Court since Proffitt v. Florida, supra. As evidenced by the case authority cited herein, there is no standardless and unchannelled imposition of death sentences in Florida. Indeed, a review of all the cases in Florida demonstrates that the Florida Supreme Court was abiding by the tenets of Godfrey v. Georgia, supra, prior to this Court's opinion.

The Florida Supreme Court in upholding the sentence of death in the case at bar concluded that the facts and circumstances presented at trial fell in line with a similar decision rendered by the Florida Supreme Court in Salvatore v. State, 366 So. 2d 745 (Fla. 1978). Therein the defendant bludgeoned the victim to death, then disposed of the body by dumping it into the sea. The death sentence was held to be an appropriate sentence. In the case at bar, Petitioner Stone bludgeoned the victim to death and then disposed of the body by dumping it into a river. In a comparison of the facts and circumstances available to the jury and the trial judge, death was the appropriate

sentence to be imposed. In Salvatore, supra, the Florida Supreme Court upheld the finding that the crime therein was heinous, atrocious, and cruel. Similarly, the Florida Supreme Court determined the acts herein equally merited a like result as to a finding that said act was heinous, atrocious, and cruel.

Respondent would urge that the Petitioner, as to his first grounds for review, failed to raise this particular issue before the Florida Supreme Court, thus, preventing the highest state appellate court an opportunity to review Petitioner's claims in light of the facts and circumstances of his case. However, more importantly, a cursory review of Petitioner's claim that as applied and in general the expecially heinous, atrocious, and cruel aggravating circumstance contained in § 921.141(5)(h), F. S., reveals that Florida's statute does not suffer from the infirmities contained in the Georgia statute and condemned by this Court in Godfrey v. Georgia, supra. The facts and circumstances herein warranted the imposition of the death sentence based on a finding that the actions of Petitioner were especially heinous, atrocious, and cruel in the killing of Jacqueline Smith and that the Florida Supreme Court in dispensing justice and determining the correctness of death sentences used reasoned and channelled judgment in assessing the appropriateness of this statutory aggravating circumstance.

II.

THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE RELATING TO MURDERS COMMITTED "BY A PERSON UNDER SENTENCE OF IMPRISONMENT", TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY UNDER THE FACTS OF THIS CASE, DO NOT CONSTITUTE A VIOLATION OF PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner asserts that the trial court's finding as an aggravating circumstance pursuant to § 921.141(5)(a), F.S., that he was a person under sentence of imprisonment at the time he committed the murder in the instant case was improper. Specifically, Petitioner argues that since the Fifth Circuit Court of Appeals had vacated the crime against nature conviction, he was not under a sentence of imprisonment and therefore the aggravating circumstance contained in § 921.141(5)(a), F.S., was inapplicable. Petitioner acknowledges that this Court in Wainwright v. Stone, 414 U.S. 21 (1973) did reverse the Fifth Circuit's opinion in Stone v. Wainwright, 478 F.2d 390 (5th Cir. 1973) and reinstated the conviction for a crime against nature, but argues that at the time the trial judge was making said findings that the aggravating circumstance found was inappropriate. Petitioner in a supplemental brief to his direct appeal brief presented this issue to the Florida Supreme Court and suffered an adverse ruling.

The Florida Supreme Court in Stone v. State, supra, in addressing this issue concluded:

> During the sentencing procedure, the prosecuting attorney argued that defendant was a person "under sentence of imprisonment." The trial judge found as an aggravating circumstance that the crime was committed "while the defendant was under sentence of imprisonment." Section 921.141(5)(a), Fla.Stat. 1973.

> Defendant was first taken into custody in Missouri after the United States Supreme Court ruled that he had been improperly discharged by a federal district court from a sodomy conviction. Defendant was detained by the Missouri authorities at the request of the State of Florida and he was returned to Florida for the purpose of serving the sentence. Defendant says that he was not under sentence of imprisonment at the time of the homicide because he had been released by a federal court order. The state contends that the legislature intended to cover persons under sentence of imprisonment, whether released by reason of bail, probation, parole, mandatory conditional release or otherwise.
>
> The sole purpose of the federal proceedings in habeas corpus was to determine the legality of the restraint on liberty. *Fast v. Wainwright*, 310 F.Supp. 404 at 405, So. District, (Fla. 1970), *affirmed* 439 F.2d 1163 (5th Cir. 1971). As long as the proceedings in federal court were pending, defendant was under sentence of imprisonment, and would remain so until the federal proceedings were concluded favorably to defendant. The final determination was that defendant be returned to custody.

[Id. at 771 - 772]

Petitioner asserts, "The application of the subsection 5(a) aggravating circumstance by the Florida Supreme Court is not only inconsistent with the Dixon definition of the statute, but it cannot be squared with the Court's more recent ruling in Ford v. State, 374 So.2d 496 (Fla. 1979)." [PP 22].

Ironically, Petitioner would have this Court modify Wainwright v. Stone, supra, wherein this Court divined that when a state statute has been construed, the interpretation by the highest state court must be given full credibility. Further, however, in Ford v. State, supra, the Florida Supreme Court rejected the aggravating circumstance regarding under sentence of imprisonment because therein the defendant was under no sentence of imprisonment.

Respondent would respectfully urge that in regard to

the second issue raised by Petitioner, Petitioner has failed to raise a claim meritorious of review by this Court. Respondent would urge that at the point in time when Petitioner suffered a conviction for sodomy up to and including the reversal by this Court in Wainwright v. Stone, supra, of the Fifth Circuit's vacation of said conviction, Petitioner was a person under a sentence of imprisonment.

III.

THE IMPOSITION OF THE SENTENCE OF DEATH IN THIS CASE UPON THE GROUND THAT IT IS "PRESUMED TO BE THE PROPER SENTENCE" IS NOT TANTAMOUNT TO A MANDATORY DEATH SENTENCE AND THEREFORE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner takes umbrage with the Florida Supreme Court's finding that inasmuch as a trial court "found these other aggravating circumstances, and no mitigating circumstances, death is presumed to be the proper sentence. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)." at 378 So. 2d 772. Petitioner is suggesting that the conclusory statements made by the Florida Supreme Court after reviewing the appropriate and applicale aggravating circumstances and lack of mitigating circumstances equates to a finding that death was mandatory in Petitioner's case. Respondent would disagree.

In Florida, pursuant to its trifucated system, death is imposed after a jury recommendation of death, a trial judge concurs that death is appropriate and findings of fact to justify same are made, and a review by the Florida Supreme Court has been made that based on the jury's determination and the judge's findings death is appropriate. In the case at bar, as well as every other capital case in Florida, a defendant has three opportunities to convince a jury, a trial judge, and an appellate court that the jury, the trial court, or other appellate decisions by the Florida Supreme Court require that once guilt has been obtained, death should not be imposed. See LeDuc v. State, 365 So. 2d 149 (Fla. 1978), State v. Dixon, 283 So. 2d 1 (Fla. 1973), and Alvord v. State, 307 So. 2d 433 (Fla. 1975).

Petitioner attempts to suggest that the infirmities found in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana,

428 U.S. 325 (1976) result where, as in the case at bar, the Florida Supreme Court has concluded that absent any mitigating circumstances and with the existence of aggravating circumstances, the death penalty is an appropriate sentence to be imposed. Petitioner asserts that, "Thus the presumption from the sentencing statute is for a sentence of life, not death. Moreover, upon a finding of one or more aggravating circumstances, death may be a proper sentence but not the proper sentence." [PP 24]. The fallacy in Petitioner's complaint is that he fails to acknowledge the fact that the Florida Supreme Court in reviewing the actions of the trial court and jury, will only substitute its conclusions where the jury's recommendation is erroneous and the trial court's findings of fact are not predicated on facts properly before the jury and judge. The Florida Supreme Court is not the trier of fact nor the authority responsible for imposing sentence, but rather, the appellate body responsible for overseeing whether trial juries and judges in Florida have done their job. To suggest now that at the appellate stage of the trifurcated system that the Florida Supreme Court can summarily overrule a non-faulty determination by a Florida jury and Florida trial court that death is the appropriate sentence would be absurd.

Petitioner asserts that he cannot fully develop this point for review and urges that he requires further opportunity to fully brief the issues and be provided a plenary consideration by this Court. Respondent would urge that Petitioner cannot develop this point in this Petition nor develop it any better in a brief because his logic is predicated on an unsound premise and totally faulty. Respondent would submit that the presumption that death is appropriate where a jury and trial judge has imposed a sentence of death and no mitigating circumstances exist and aggravating circumstances do exist, is appropriate and not in violation of any decisions rendered by this Court.

IV.

PETITIONER'S PRE-TRIAL STATEMENT TO THE POLICE WAS NOT OBTAINED IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's last point for review questions the propriety of the Florida Supreme Court's opinion regarding whether the confessions tendered by Petitioner violated his constitutional rights in regard to this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). The Florida Supreme Court in addressing this issue noted:

> Defendant next contends that his confession was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
>
> At a hearing on the motion to suppress, it appeared from the testimony that defendant was first taken into custody in Missouri under the authority of a detainer lodged pursuant to section 941.45, Florida Statutes (1973). Defendant's conviction in another case had been affirmed on direct appeal. *Stone v. State*, 245 So.2d 91 (Fla. 1st DCA 1971) *cert. den.* 267 So.2d 329 (Fla.1972).
>
> Defendant then sought and received relief in a federal district court and the United States Court of Appeals, Fifth District. *Stone v. Wainwright*, 478 F.2d 390 (5th Cir. 1973). The Untied States Supreme Court reversed the Fifth Circuit Court of Appeals. *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973). It was subsequent to this holding that defendant's custody was sought by the prison officials of Florida.
>
> The automobile accident in Missouri triggered a routine identification check and a Florida official was sent to Missouri to take custody of the defendant.
>
> Defendant, while in Missouri, was advised that he was a suspect in a murder case. When defendant was first taken to the Leon County Jail (where he was held for five or six days until his admission to the Lake Butler Reception and Medical Center), he contends that he should have been taken before a booking officer as

required by rule 3.111(c), Florida rules of Criminal Procedure. Defendant was brought to Florida under a detainer related to an entirely different offense. Although he was a suspect, he had not been charged with the commission of any homicide nor had he been arrested for any new offense. Therefore, it was not necessary to take him before a "booking officer" or a magistrate.

Defendant was given *Miranda* warnings on no less than six different occasions. At 11:05 A.M., September 10th, he was first given the warnings. At this time, he waived his rights and did not ask for an attorney. He was again given the warnings at 1:40 p.m. on the same day, and once again defendant waived his rights and did not ask for an attorney.

On September 16, the defendant voluntarily took a lie detector test, at which time his rights were explained to him again. He was also warned of his rights on the afternoon of September 16th. On September 18th, defendant was given *Miranda* warnings at 1:45 p.m. and 7:30 p.m. All of these warnings were read and reviewed with him, and he appeared to understand them.

There is evidence that defendant wanted to get in contact with an attorney during this period of time. The attorney had offices in Missouri and represented the truck driver involved in the hospitalization of defendant. Defendant had received the attorney's card while he was in the Missouri hospital and indicated that he wished to contact the attorney so he could sue for a neck injury which he received in the accident. The record does not disclose that defendant requested counsel in connection with thehomicide under investigation. At first, the defendant apparently was not worried about the murder charge. When defendant called an attorney after the confession, the call was made to this Missouri attorney.

Defendant alleged that he was told a court order required him to take a lie detector test. It was necessary to secure a court order in order to have the defendant released from jail, but defendant was told that he had a choice as to whether to take the test or not. The form delineating his rights, which was explained to him before he took the test, advised him that he did not have to take it. Defendant even admitted that he consented to take the lie detector test.

> A request for counsel for an unrelated purpose is not sufficient to require interrogation to cease under *Miranda v. Arizona*. This was the holding in *Hill v. State*, 429 S.W.2d 481 (Tex.Cr.App.1968), where the accused indicated that he was going to get counsel for an unspecified purpose.
>
> The law enforcement officers testified that defendant did not request consultation with an attorney before questioning on either September 16 or September 18, the days he admitted his guilt. Even had he requested consultation with an attorney, that would not prohibit a subsequent waiver. In *Nunez v. State*, 227 So.2d 324 (Fla. 4th DCA 1969), the court stated:
>
> > Simply stated, the question is whether an accused in custody, having once made known his desire to have the assistance of counsel, may subsequently voluntarily waive such right.
> >
> > We think this question must be answered in the affirmative, because an accused in custody is just as much entitled to waive the constitutional rights outlined in the *Miranda* case as he is to insist upon them.
>
> Just before the polygraph test, the defendant was given adequate *Miranda* warnings. The examination began at 10:30 a.m. and lasted about one and one-half hours. Within minutes after learning he flunked the test, defendant confessed.
>
> The ruling of the trial judge that the confession was freeely and voluntarily made comes to this Court with the same presumption of correctness which attends jury verdicts and final judgments. We are not at liberty to substitute our views of the credibility or weight of conflicting evidence for that of the trial judge and his ruling should not be lightly set aside. *Stanford v. State*, 110 So.2d 1 (Fla.1959). We hold that the statements made were freely and voluntarily given and there were no *Miranda* violations.

[378 So. 2d at 769 - 770]

The facts reveal in the case at bar that Petitioner was given his Miranda warning on no less than six different occasions. At the Motion to Suppress the Confessions made by Petitioner, it was discerned that he could read, write, and understand English. On

September 10, he was given his Miranda warnings at 11:05 a. m., and at such time he waived his rights and did not ask for an attorney [MS 35-36]. He was given the Miranda warnings again at 1:45 p. m., on September 10, and again he waived his rights and did not ask for an attorney. When he took the lie detector test on September 16, his rights were explained to him again [MS 44-46]. He was warned of his rights again that afternoon [MS 49]. He was warned again of his rights on September 18, at 1:45 p. m., and 7:30 p. m. [MS 55]. All these forms were read and reviewed with him. There was evidence that the forms were read to him and he appeared to understand them [MS 98]. The record reflects that the Petitioner sought to get in contact with an attorney during this time. The attorney had offices in Missouri and represented his opponent in a civil action. At that time, apparently, the lawyer had given the Petitioner his card while he was in the hospital. Petitioner indicated that he wanted to get in touch with the attorney because he wanted to sue for his neck injuries. The record is clear that Petitioner never requested counsel in connection with the homicide under investigation and indicated that he was not worried about the murder case. All allegations made by Petitioner regarding the statements made by law enforcement officers regarding the investigation in the murder case and the availability of counsel were affirmatively refuted by the officers at trial. The record further discloses that Petitioner admitted he consented to take the lie detector test [MS 42].

Not only did Petitioner not request counsel in connection with the homicide investigation which he was not worried about, but he expressly waived counsel on each occasion that law enforcement officers spoke to him. Even after he spoke to the attorney on September 16, he still waived his rights again on September 18, and gave another taped statement. As argued to the Florida Supreme Court

and in argument herein, Respondent would urge that the Petitioner's request for counsel for an unrelated purpose is not sufficient to require interrogation to cease pursuant to Miranda v. Arizona, supra. The record reflects that after repeated warnings regarding Petitioner's right to have counsel present, his right to remain silent, and that anything he said could and would be used against him, Petitioner confessed to the police. Just prior to taking the polygraph test, the following was read into the record.

> I have the right to remain silent. I cannot be forced or coreced in any way or manner to submit to this test or be required to answer any questions and anything I say can be used in evidence against me in a court of law. I have the right to an attorney. He will be retained by me or appointed by the court if I cannot afford to hire an attorney. I have a right to talk to such an attorney before saying anything or taking this examination and further that I have a right to have that attorney present with me during this examination or any interview If I decide to answer the questions now and waive my rights to first talk with an attorney or have an attorney present with me during questioning I will still have the right to stop answering at any time until I talk to a lawyer. Being fully aware and understanding what my rights are I knowingly and voluntarily waive my foregoing rights and hereby consent and agree to this examination. No threats or promises or inducements of any kind have been made or offered to me.

[MS 45-46]

The polygraph examination began at 10:30 a. m. and lasted about an hour and one-half. Within minutes after learning he had flunked the test, Petitioner confessed.

Respondent would urge that the trial court's determination

that the confessions made by Petitioner were made voluntarily after full Miranda warnings were given was proper. The Florida Supreme Court in affirming the judgment as to this issue concluded that the confessions tendered by Petitioner were made freely and voluntarily. Therefore, it is respectfully submitted that as to the fourth claim raised by Petitioner in his Petition for Certiorari, he has failed to present a claim which warrants relief via this Court's certiorari review.

CONCLUSION

WHEREFORE, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Case No. 79-

RAYMOND R. STONE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

A P P E N D I X

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IN THE SUPREME COURT OF FLORIDA

RAYMOND R. STONE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 48,275

Docketed
4-5-76

BRIEF OF APPELLANT

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TOPICAL INDEX

		PAGE
TOPICAL INDEX		i
AUTHORITIES CITED		ii
I	PRELIMINARY STATEMENT	1
II	STATEMENT OF THE CASE	2
III	STATEMENT OF THE FACTS	5
IV	POINTS ON APPEAL	22
V	ARGUMENT	24
	POINT I	24
	POINT II	33
	POINT III	52
	POINT IV	59
	POINT V	63
	POINT VI	70
VI	CONCLUSION	91
CERTIFICATE OF SERVICE		92

AUTHORITIES CITED

CASES	PAGES
Alford v. State, 307 So. 2d 433 (Fla., 1975)	70,73
Alvord v. State, 322 So. 2d 533, (Fla., 1975)	67,71,82,83
Anderson v. Chapman, 109 Fla. 54, 146 So. 675 (1933)	65
Baker v. State, 137 Fla. 27, 188 So. 2d 634 (1939)	89
Branch v. State, 212 So. 2d 29 (2 D.C.A., Fla., 1968)	26
Brown v. State, 6 Md. 564, 252 A.2d 272 (1969)	48,49
Cauhn v. State, 98 Fla. 185, 122 So. 565 (1929)	65
Commonwealth v. Johnson, 440 Pa. 342, 269 A.2d 752 (1970)	26
Davis v. State, 123 So. 2d 703, (Fla., 1960)	89
Dobbert v. State, Case No. 45,558 (Fla.; opinion filed January 14, 1976)	79
Franklin v. State, 257 So. 2d 21 (Fla., 1971)	33
Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969)	49,50
Gardner v. State, 313 So. 2d 675 (Fla., 1975)	78,83,84
Hancock v. State, 90 Fla. 178, 184, 105 So. 401 (Fla., 1925)	55

CASES (Continued)	PAGES
Halliwell v. State, 323 So. 2d 557 (Fla., 1975)	66,69,74,78, 81,84,85
Hallman v. State, 305 So. 2d 180 (Fla., 1974)	72
Hawkins v. State, 206 So. 2d 5 (Fla., 1968)	29
Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961)	26
Jefferson v. State, 128 So. 2d 132 (Fla., 1961)	59
Kirsner v. State, 308 So. 2d 567 (3 D.C.A., Fla., 1975)	62
LaBarbera v. State, 63 So. 2d 654 (Fla., 1953)	89
LaMadeline v. State, 303 So. 2d 17 (Fla., 1974)	78
Larmon v. State, 81 Fla. 553, 88 So. 471 (1921)	54
Lee v. State, 96 Fla. 59, 117 So. 699 (1928)	59
Lewis v. State, 93 So. 2d 46 (Fla., 1956)	88
Maine v. Superior Court of Mendocino County, 66 Cal.Rptr. 742, 68 Cal.2d 375, 438 P.2d 372 (1968)	30
McQueen v. State, 304 So. 2d 501 (4 D.C.A., Fla., 1975)	61,62
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)	22,33,39,44,46

CASES (Continued) PAGES

Murphy v. Florida, __U.S.__, __S.Ct. __, 44 L.Ed. 2d 589 (1975) 26

Nettles v. State, 248 So. 2d 259 (2 D.C.A., Fla., 1971) 47

Oliver v. State, 250 So. 2d 888 (Fla., 1971) 28

Proffitt v. State, 315 So. 2d 461 (Fla., 1975) 75

Raines v. State, 65 So. 2d 558 (Fla., 1953) 25

Reyes v. Kelly, 224 So.2d 303 (Fla., 1969) 87

Sawyer v. State, 313 So. 2d 680 (Fla., 1975) 73,75,78,85

Schneble v. State, 201 So. 2d 881 (Fla., 1967) 60

Sheperd v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966) 29,30

Silverthorne v. United States, 400 F. 2d 627 (9th Cir., 1968) 26

Smart v. State, 274 So. 2d 577 (2 D.C.A., Fla., 1973) 62

Songer v. State, 322 So. 2d 481 (Fla., 1975) 69,80

Spinkellink v. State, 313 So. 2d 666 (Fla., 1975) 86

State v. Dixon, 283 So. 2d 1 (Fla., 1973) 69,70,71,72,73, 74,76,77,80,81,82

State v. Prosser, 235 So.. 2d 740 (1 D.C.A., Fla., 1970) 46

CASES (Continued) PAGES

Stone v. State, 245 So. 2d 91 (1 D.C.A., Fla., 1971) 33

Stone v. State, 264 So. 2d 81 (1 D.C.A., Fla., 1972) 33

Swan v. State, 322 So. 2d 485 (Fla., 1975) 69,71,79,81,84

Taylor v. State, 294 So. 2d 648 (Fla., 1974) 67,80,85

Tedder v. State, 322 So. 2d 908 (Fla., 1975) 74,77,78,79,84

Thompson v. State, Case No. 45,107 (Fla.; opinion filed January 21, 1976) 69,81

Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L.Ed. 2d 630 (1958) 90

Wainwright v. Stone, 478 F.2d 390 (5th Cir., 1973) 33

Wainwright v. Stone, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed. 2d 179 (1973) 33

Wallis v. State, 279 So. 2d 95 (2 D.C.A., Fla., 1973) 47

CONSTITUTIONS AND STATUTES

Florida Constitution, Article I, Section 16 25

United States Constitution, Sixth Amendment 32

" " " Eighth Amendment 23

" " " Fourteenth Amendment 23,32

CONSTITUTIONS AND STATUTES (Continued) PAGES

Florida Statutes, Chapter 921 64

" " Section 782.04(1)(a) 72

" " " 794.011(2) 73

" " " 921.141 73,74

" " " 921.141(3) 67

" " " 921.141(5)(a) 66

" " " 921.141(5)(c) 72

" " " 921.141(5)(d) 72,73

" " " 921.141(5)(f) 72

" " " 921.141(5)(h) 72

" " " 921.141(6) 68,75

" " " 921.151 71

" " " 941.45 33,63

FLORIDA RULES OF COURT

Florida Rule of Criminal Procedure 3.111(c) 34

" " " " " 3.130(b) 36

" " " " " 3.130(b)(2)(iii) 36

Florida Rule of Criminal Procedure 3.170(g) 87

" " " " " 3.171(a) 87

" " " " " 3.190(j) 33

" " " " " 3.240 28

FLORIDA RULES OF COURT (Continued) PAGES

Florida Rule of Criminal Procedure 3.350(a) 29

" " " " " 3.580 33

" " " " " 3.370(a) 24

" " " " " 3.710 71

" " " " " 3.820(b) 65

MISCELLANEOUS

13 Fla. Jur., Evidence, §284 54

50 C.J.S, Juries, §276 c. 26

Annotated, 21 A.L.R. 2d 1089 24

Annotated, 21 A.L.R. 2d 1216 54

Annotated, 33 A.L.R. 3d 17 30

Annual Report, 1974-75, Florida Division of Corrections, pages 24 and 25 27

Black, Capital Punishment, The Inevitability of Caprice and Mistake, 47 (1974) 89

Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla.St.L.Rev. 108 (1974) 76

Haney, The Need to Repeat Miranda Warnings on Subsequent Interrogations, 12 Washburn L.J. 222 (1973) 47

Huie, The Execution of Private Solvik, 172-173 (5th Dell. ed. 1974) 80

MISCELLANEOUS (Continued) PAGES

Torcia, Wharton's Criminal Evidence, §635 (13 Ed., 1973) 55

White, The Role of the Social Sciences in Determining the Constutionality of Criminal Punishment, 45 Am.J. Orthopsychiatry 581 (1975) 89

IN THE SUPREME COURT OF FLORIDA

RAYMOND R. STONE,	:	
Appellant,	:	
v.	:	CASE NO. 48,275
STATE OF FLORIDA,	:	
Appellee.	:	

BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant was the defendant in the trial court; Appellee will hereinafter be referred to as State. References to the record on appeal will be designated by use of the symbol "R"; references to the transcript of testimony taken at the trial court proceedings will be designated by use of the symbols "TR"; references to the transcript of testimony taken at the hearing held on the motion to suppress the confession will be designated by use of the symbols "MS"; references to the transcript of testimony taken at the aggravation/mitigation proceedings will be designated by use of the symbols "AM"; references to the transcript of the sentencing proceedings will be designated by use of the symbol "S". All references will be to the appropriate page number, in parenthesis.

II STATEMENT OF THE CASE

Appellant, RAYMOND R. STONE, was charged by indictment filed November 4, 1974, with the premeditated murder of Jackqueline Smith (R-1,2). A demand for discovery and motions for continuance were filed together with responses and orders thereto (R-3-13). Appellant filed a motion seeking to suppress his confession (R-14-18). A hearing was held and the motion was denied (MS-165).

A jury trial commenced on July 8, 1975 (TR-3). Appellant moved to have the jury sequestered after it was sworn (TR-32); the motion was denied (TR-33). Appellant moved to have each prospective juror examined individually (TR-33-36); that motion was denied (TR-73). The jury was sworn and admonished concerning its duties during the trial (TR-206-214).

During the presentation of the State's case Dr. William R. Naples was allowed to present certain expert testimony concerning a portion of a human skull (calva) over the strenuous objection of defense counsel (TR-518-526). The skull fragment was admitted into evidence over defense objection (TR-541). Certain blood samplings were also admitted into evidence over defense objection. One was a spot of blood taken from a bridge (TR-574-579); the other was a spot of blood taken from two brackets that were removed

from under Mr. Gay's house (TR-769,770; 797-801). Appellant objected to Ms. Janet Estes, serologist, testifying in regard to the blood samples. The trial court refused to proffer her testimony (TR-569,570). Appellant objected to the introduction of two taped confessions into evidence on the ground that the State had not established a corpus delicti (TR-626-652;753;779).

After the State rested its case appellant moved for a judgment of acquittal (TR-820-821). The motion was denied (TR-835). It was renewed at the close of all the evidence and was again denied (TR-906,907).

The jury returned a verdict of guilty of the crime charged in the information on July 11, 1975 (R-20; TR-1012, 1013). The Court adjudicated appellant guilty of first degree murder (TR-1013).

On July 18, 1975, the second portion of the bifurcated trial proceedings were held (AM-1). Appellant objected to the State being allowed to argue that appellant was "under sentence of imprisonment" at the time of the offense (AM-65-67). The trial court overruled the objection (AM-68). An ore tenus motion for new trial was also considered by the trial court at that time and it was denied (AM-70,71). A majority of the jury recommended that appellant be sentenced to death (AM-78-80; R-21).

A sentencing hearing was held on October 1, 1975 (S-2). The trial judge listed the aggravating circumstances which it found, including the finding that appellant committed the crime while "under sentence of imprisonment" (S-15). The trial court found that mitigating circumstances, such as there were, did not outweigh the aggravating circumstances (S-17). It then sentenced appellant to death (S-17,18; R-22).

A timely notice of appeal was filed October 23, 1975 (R-23). Appellant was declared insolvent and the Public Defender, Eighth Judicial Circuit, was appointed to take the appeal (R-27). The Public Defender, Eighth Judicial Circuit, designated the Public Defender, Second Judicial Circuit, to handle the appeal (R-32).

III STATEMENT OF THE FACTS

A. STATEMENT OF FACTS RELATING TO CONFESSION

A hearing was held on June 27, 1975, at the Union County Courthouse following the filing of appellant's F.R.Cr.P. 3.190(i) motion. The following is a summary of the evidence that was presented at that hearing:

Appellant, RAYMOND R. STONE, was the first witness to testify. He is 36 years old and has a third grade education (MS-3). Appellant was driving in Missouri when a semi-trialer truck collided with the rear of his vehicle. Appellant was hospitalized. While in the hospital local police officials arrested him on August 31, 1974, not for an infraction of Missouri motor vehicle laws, but because Florida had lodged a detainer against him (MS-4,20). The explanation given appellant was that the State had won an appeal relating to an earlier criminal conviction and it wanted him returned to serve the remainder of his sentence.

Wayne C. Scott, special agent to the Director of the Division of Corrections (now the Department of Offender Rehabilitation), met appellant in Missouri on September 4, 1974, and together they flew to Tallahassee, Florida (MS-60). Appellant was told that he was being taken to the Lake Butler Reception and Medical Center (hereinafter referred to as "RMC") for further medical treatment (MS-6). Appellant

was also told that he was a suspect in a murder case, but no details were furnished him (MS-28). Appellant attempted to obtain an attorney's address from Mr. Scott, who had possession of much of appellant's personal property taken from his wrecked automobile, but Mr. Scott refused to turn over the address (MS-5,8,29-32,63,64). On the way to RMC appellant was held in the Leon County jail in Tallahassee. He was not taken before a committing magistrate (MS-5). He remained in the Leon County jail for five or six days. Appellant, accompanied by Mr. Scott, arrived at RMC at approximately 9:00 a.m. on September 10, 1974 (MS-7).

Shortly thereafter John Whitehead, Sheriff of Union County, Florida, and Joe Uebelher, special agent with the Florida Department of Criminal Law Enforcement (hereinafter referred to as FDCLE), began questioning appellant in relation to his whereabouts on August 22 and 23, 1974. Appellant was questioned by them until about 4:30 or 5:00 p.m. At no time during these conversations did he admit any knowledge of the death of Jackqueline Smith (MS-9). Appellant again requested to speak to an attorney and Agent Uebelher told appellant that he would be provided with the telephone number that he had previously requested, at a later date. It was never returned to appellant (MS-10). The explanation given appellant was that since he had not

been charged with a crime, he did not need an attorney and furthermore that he would have to go to court to have an attorney appointed and since he was not charged, he would not be going to court (MS-14,50).

On september 16, 1974, appellant was awakened at approximately 4:30 a.m. by Agent Uebelher and Sheriff Whitehead and directed to get dressed because the three of them were going to Orlando. Appellant again requested to see an attorney and the officers said, "the birds aren't up yet...you know an attorney ain't up." (MS-12,42) The police officers had a court order, but they refused to show it to appellant and they did not tell him where he was being taken (MS-41). Later, appellant was told that he was being taken out for a lie detector test pursuant to a court order (MS-12,13,47). Appellant again asked for the telephone number of his attorney and he was told it would be given to him "on the way back" (MS-13,43).

After appellant arrived in Orlando, Charles Moniack, Special Agent with the FDCLE (TR-662), gave appellant a polygraph examination (MS-15). Afterwards Moniack told appellant that in his opinion appellant was guilty of the murder of Jackqueline Smith. Moniack then left the room and returned with Agent Uebelher and Sheriff Whitehead and he repeated his opinion in their presence (MS-16).

Agent Moniack then left and according to appellant's testimony Sheriff Whitehead stated:

> "'Well, we have got enough evidence now without this here. We have got hair out of the car. We have got blood our of your car.' He said two or three others, I don't remember what he said. He said, 'We've got enough now to put you in the electric chair but if you will go ahead and cooperate with me we have got a new district attorney and he'll go along with just about anything I tell him to do. I rule Lake Butler. I run that court in there. Whatever I say goes.'" (MS-16,17;48)

Appellant then confessed to the crime (MS-17). Appellant was not given a Miranda warning during that day prior to his initial confession (MS-18-20). An hour later a tape recording of the confession was made and another recorded statement was taken on September 18, 1975 (MS-18,23). Appellant was finally allowed to call an attorney on the way back to prison from Orlando, following the confession (MS-20,21,53).

Agent Wayne Scott testified that when he arrived in Missouri to take appellant into custody, he was advised to return several telephone calls to Florida. Agent Scott placed the calls and discovered that appellant was a "possible suspect" in a murder case and that he was to seize appellant's personal belongings as evidence (MS-61). On the way back to Florida appellant twice asked Agent

Scott for a business card that bore the name of an attorney (MS-63). Agent Scott distinctly remembered making a statement to both Sheriff Whitehead and Agent Uebelher concerning appellant's request to obtain the name and telephone number of an attorney (MS-64,69).

The deposition of Agent Moniack, the polygraph examiner, was introduced as evidence at the hearing upon stipulation of counsel (MS-70,74).

Sheriff John Whitehead testified that appellant became a suspect in the investigation of Jackqueline Smith's disappearance on August 23, 1974; on that day Sheriff Whitehead issued a BOLO describing appellant (MS-77). Sheriff Whitehead stated that when he and Agent Uebelher met with appellant on September 10, 1974, appellant did not admit any knowledge as to the disappearance or death of Jackqueline Smith (MS-80). Sheriff Whitehead also remembered meeting with appellant at 6:30 a.m. at RMC preparatory to leaving for Orlando for a polygraph examination (MS-80,81). After the examination appellant admitted committing the crime (MS-82). Sheriff Whitehead denied making any statement indicating to appellant that he (Whitehead) had possession of circumstantial evidence, that he "ran things in Union County" and that if appellant confessed he would insure that appellant received a con-

current sentence (MS-84,85). Sheriff Whitehead could not recall whether appellant was advised of his Miranda rights after the polygraph examination, but before he confessed (MS-90). Sheriff Whitehead stated that he did not formally arrest appellant before the grand jury returned its indictment because appellant was already in custody (MS-91). However, Sheriff Whitehead "certainly would have" made every effort to arrest appellant had he not been taken into custody on the capias (MS-93).

Agent Uebelher stated that the dates of his first two meetings with appellant were September 10 and 16, 1974. Appellant was first told of the polygraph examination at 6:30 a.m. on September 16. Uebelher stated that appellant "became a suspect almost from the start" (MS-106,107). He did not recall appellant making a demand for his attorney's name and address at the September 10th meeting (MS-111). After the polygraph examination appellant was not advised of his constitutional rights. It was at that time that he confessed (MS-117,118).

B. STATEMENT OF FACTS RELATING TO TRIAL

The following is a summary of the testimony presented by the primary state witnesses at trial:

Marvin Smith, husband of the deceased Jackqueline

Smith, employed appellant sometime in May, 1974, to help him farm his tobacco crop in Union County, Florida (TR-237,239). Appellant stayed with the Smiths in their home (TR-242).

On August 22, 1974, Jackqueline Smith drove her green Ford to a General Electric plant where she worked from about 3:00 until 11:00 p.m. (TR-243,244). Marvin Smith saw appellant at approximately 8:30 p.m. that evening. Mr. Smith went to bed at 9:30 p.m. and woke up at 2:30 a.m. at which time he noticed that his wife had not returned from work (TR-249-251). Mr. Smith woke up his children, loaded them in his truck and drove to the General Electric plant. He drove through the parking lot and asked a plant guard if there was a 1974 green Ford parked nearby. The guard had not seen the car (TR-251,252). Mr. Smith returned home and eventually notified police authorities (TR-253). Later in the morning Freeman White, a neighbor, told Mr. Smith that he had seen the car parked in a field near the Smith house (TR-254;366-369). Mr. Smith examined the vehicle together with police officers.

Mr. Smith testified that his wife was once admitted to a hospital for back surgery. He identified his signature on certain hospital records which were prepared at the time his wife was admitted (TR-261-263).

Mrs. Janet Mathis, acting director of the medical records department at Shands Teaching Hospital in Gainesville, Florida, identified the hospital record previously identified by Mr. Smith as relating to his wife's visit to the hospital (TR-294-297). That document, together with other records, was admitted into evidence (TR-301). Certain x-rays were also identified by Mrs. Gretchen Combs as having come from a file with the same patient number; they were turned over to the FDCLE (TR-306-309).

Lewis Gay lives about one quarter mile from the Smith residence. He hired appellant from time to time during the fall of 1974 to work on his farm (TR-346,347). Mr. Gay remembered seeing appellant in the late afternoon of August 22, 1974. Appellant told him that he was going to a truck stop to see a woman (TR-348,349). Mr. Gay also saw appellant the following morning near Providence. Appellant wanted some money and some gasoline for his car. Mr. Gay did not give appellant any money, but he did extend him credit for the gasoline (TR-352,363).

Freeman White, his son Paul White, Union County Sheriff John Whitehead and FDCLE agent Joseph Uebelher were present in a field at the location of the 1974 green Ford on August 23, 1974. Freeman White showed Mr. Smith where the car

was parked (TR-368). Freeman White stated that he could see "marks" in the field near the car (TR-370). He could also see one set of footprints (TR-372). Sheriff Whitehead also saw the marks near the car; it appeared to him that there had been a "struggle" (TR-388-389). He saw two "tracks" - one larger than the other (TR-390). No plaster casts of the "tracks" were made (TR-396). The ground around the car was described by Agent Uebelher as being "very sandy" (TR-301,402). Uebelher also saw two sets of footprints (TR-403).

On September 1, 1974, Ernest Strain, Jr. and a friend were traveling down the Santa Fe River which divides Alachua County from Union County, Florida (TR-433). They found a body approximately one-half mile from a bridge near the south bank of the river (TR-433,434,441). They immediately contacted police authorities (TR-436). Sheriff Whitehead and an ambulance driver named Willits arrived at the location where the body was found and helped to retrieve it (TR-419-421;442). The body was badly deteriorated; the head, an arm, and a hand were missing (TR-425,426,443). A dark stain that was either the size of a thumb nail, or a nickel, or a quarter, or a silver dollar, was found on the bridge (TR-428-430;448). The spot was scraped into a small plastic bag marked State's Exhibit Q (TR-448,449). The spot was removed

from the Union County side of the bridge (TR-455).

On December 6, 1974, Charles Nebbawonick, a member of the diving unit of the Florida Highway Patrol, found a portion of a human skull 150 to 200 yards west of the bridge and on the north side of the river (TR-473-476,478). Agent Uebelher stated that the skull bone was found 25-30 feet back from the water line (TR-482-483). Bone fragments, hair fibers, and a woman's bra were also discovered nearby (TR-485,487).

Dr. William R. Maples is a physical anthropologist employed by the Florida State Museum (TR-491). He examined the skull fragment, which he referred to as a "calva", and the two bone fragments which were found near the river (TR-500). It was "very difficult" for him to give an estimate of the age of the calva, but he felt that it fell within a distribution having a mean of approximately 50 years (TR-501). His report indicated an age range of 45 to 55 years (TR-513). At trial he extended that limit "from just below 40 to right about 60" (TR-535). He believed that the calva came from the body of a white woman (TR-502). He conceded, however, that his opinion was based on norms and that it might have belonged to a man of a different race (TR-533,534). Dr. Maples noted evidence of trauma to the calva (TR-529). In his opinion an "appreciably large amount

of force" caused the traumas "at or near the time of death" (TR-531).

Mrs. Janet Estes is a serologist employed by the Bureau of Criminal Identification. Before she testified defense counsel objected to the introduction of State Exhibit Q (material scraped from the bridge) (TR-448,449, 569). The objection was overruled (TR-570,575) and she testified that State Exhibit Q contained human blood staining (TR-571). She was unable to determine the blood group factor (TR-572). At the close of her testimony defense counsel reiterated his objection to the introduction of such evidence (TR-576-578), but the court's ruling remained the same (TR-578).

Dr. L. R. Beamer was employed as an Associate Medical Examiner for Duval County during September, 1974 (TR-581). He performed an autopsy on the body recovered from the river (TR-583). Among his discoveries was a surgical scar just above the tail bone (TR-583,584). It appeared to be a laminectomy scar similar to an operation that Jackqueline Smith had undergone (TR-584,585). Examination of the corpse revealed the presence of metal sutures which were not mentioned in the medical report of Jackqueline Smith (TR-386,387,606,607). Dr. Beamer also noted an abnormality of the twelfth rib of the corpse which corresponded to an abnormality appearing in an x-ray of Jackqueline Smith

(TR-592-595). Based on those observations he believed that the body he examined on September 2, 1974, belonged to the same person identified through x-rays and hospital records as Jackqueline Smith (TR-596). His examination of the skull fragment led him to believe that trauma to the bone occurred near or at the time of death (TR-603,604), although the injuries to the skull could have occurred four to six hours after death (TR-611). Defense counsel was not allowed to ask Dr. Beamer whether he had an opinion as to whether the skull fragment had at one time belonged to the corpse recovered from the river (TR-613,614).

The State's case was concluded with the introduction of recorded statements given by appellant to police officers. Defense counsel objected to their introduction on the grounds that they were not received freely and voluntarily and that the State had not established a corpus delicti prior to their admission (TR-626-651). The court overruled those objections (TR-652). It also allowed the State to proceed on a felony murder theory (TR-653-662).

FDCLE agent Charles Moniack played a tape of the interview of September 16, 1974 (TR-692). A voice, identified as belonging to appellant, proceeded to describe his various activities commencing with August 22, 1975 (TR-696). That description follows here: After putting

in fence posts for Willie Roberts (TR-696-697), appellant bought a six pack of beer (TR-698) and three marijuana cigarettes (TR-707,710). He decided to go "juking" in Gainesville (TR-707,708). He intended to meet a girl named "Barbara", but she did not show up (TR-710). He stopped by the Smith residence (TR-713) and then he drove to a truck stop and later to a gas station to buy more beer (TR-716). He then drove to a spot off the highway and drank more beer and had another marijuana cigarette (TR-718,719). He was there about 20 minutes when he saw Jackqueline Smith's vehicle. She pulled up to him and said, "You decided to meet me now." He answered, "Yeah" (TR-722). She parked off to one side. He remembered having a hatchet in the back seat of his vehicle (TR-724,725). They drove off together in his car until they came to a bridge. He got out of his car with the hatchet behind him and then he struck her on top of the head with it (TR-727,747). He then threw her body into the Santa Fe River (TR-729). Afterwards he drove around for a while and met with Ray Gay at about 7:30 a.m. (TR-732). Appellant drank some more beer. He bought some gasoline and drove back and forth to Jacksonville (TR-736-740). Appellant drove to Valdosta and then to Atlanta, Georgia (TR-742,743).

A second taped confession taken on September 18,

1974, was also played for the jury over defense counsel's objection (TR-779). The second statement was similar to the prior admission (TR-783-792).

Ms. Janet Estes returned to the witness stand to testify for the State (TR-797). She ran tests on certain brackets that were removed from under Mr. Gay's house (TR-769,797). On one of the brackets she found blood staining but she was unable to determine whether it came from a human being or a mosquito (TR-798,799,800).

The following is a summary of testimony elicited from the primary defense witnesses at the trial:

Paul Newberry was employed by a security guard agency and was assigned to guard the General Electric plant on August 22 and 23, 1974 (TR-836). He and his partner Joe Martin made a security check of the plant every hour and kept a log of their rounds. He was "positive" that he had not spoken to any man that evening concerning the whereabouts of an automobile or a woman (TR-836,838).

Joe Martin stated that he was also in uniform at the General Electric plant on the evening in question (TR-845,846). He was "sure" that no one drove into the parking lot between 2:30 and 4:00 a.m. to inqure about an automobile or a missing woman (TR-847).

C. STATEMENT OF FACTS IN REGARD TO AGGRAVATING AND MITIGATING CIRCUMSTANCES

Following closing arguments by the parties (TR-909-981) and the court instructions on the law (TR-982-1010) the jury retired to consider the evidence (TR-1011). It found appellant guilty of first degree murder (TR-1012). Appellant was adjudicated guilty on July 11, 1975 (R-20). The penalty portion of the bifurcated trial was held seven days later on July 18, 1975, at which time evidence in aggravation and mitigation was heard (AM-1). The following is a summary of the evidence adduced by the parties:

The State introduced a document reflecting that appellant was sentenced to serve ten years imprisonment for robbery in 1963 (AM-4,19). It also introduced another document dated sometime in May, 1970, that indicated that appellant was sentenced to serve a term of years for having committed the "crime against nature" (AM-4,15,19). Finally, it introduced a "retake order" that was issued following a successful appeal by the State from an order that had released appellant from his sentence which he was serving on the sodomy violation (AM-5,20). The State then rested its case (AM-6).

Appellant, RAYMOND R. STONE, took the witness stand in his own behalf and stated that he was 36 years old and

had a third grade education (AM-6). He was first placed in a juvenile correctional institution when he was 12 years old. He remained there for nine years, at which time he was placed in a mental hospital in Fulton, Missouri (AM-7). After leaving the mental hospital appellant was transferred back to the juvenile institution (AM-8). Appellant was then 17 years old. He was placed in the Algoa Reformatory in Missouri and he remained there for approximately one year. He was later transferred to the Missouri State Penitentiary. By that time he was 18 or 19 years old (AM-8). From there appellant was transferred to the Fulton State Mental Hospital. He was then returned to the State Penitentiary. He was finally released in 1959 when he was approximately 20 years old (AM-9).

One year later appellant was placed in Florida State Prison (AM-9). He was granted a new trial in 1963 and was convicted and returned to prison. He was released in 1970. Twenty three days later he was "busted again" and he was returned to Florida State Prison. He was then released in 1972 (AM-9). Appellant has not heard from his father or his brothers and sisters since 1955 (AM-10,11).

Following the presentation of the above evidence counsel presented arguments to the jury (AM-11-56). The trial court again instructed the jury concerning aggravating

and mitigating circumstances which it was to consider (AM-56-63). Appellant objected to the State being allowed to argue that appellant was "under sentence of imprisonment" merely because a retake order or capias had been issued following a federal court decision concerning another charge (AM-66).

A majority of the jury recommended that appellant be sentenced to death (AM-78).

IV POINTS ON APPEAL

POINT I

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE THE TRIAL COURT DID NOT GRANT A CHANGE OF VENUE SUA SPONTE, REFUSED TO ALLOW INDIVIDUAL VOIR DIRE EXAMINATION OF THE PROSPECTIVE JURORS AND REFUSED TO SEQUESTER THE JURY.

POINT II

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE THE TRIAL COURT RULED THAT A CONFESSION OBTAINED IN CONTRAVENTION OF THE PRINCIPLES ENUNCIATED IN MIRANDA V. ARIZONA WAS ADMISSIBLE IN EVIDENCE.

POINT III

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE THE TRIAL COURT ALLOWED INTO EVIDENCE PIECES OF BONE, BLOOD SAMPLES, AND EXPERT TESTIMONY RELATING TO SAID EXHIBITS.

POINT IV

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WHEN THE TRIAL COURT ALLOWED CERTAIN TAPED CONFESSIONS TO BE PLAYED TO THE JURY BEFORE THE STATE HAD ESTABLISHED THE CORPUS DELECTI OF THE CRIME ALLEGED.

POINT V

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WHEN THE TRIAL COURT: (A) ALLOWED THE PROSECUTING ATTORNEY TO URGE THE JURY TO CONSIDER THE FACT THAT A CAPIAS HAD BEEN ISSUED ON APPELLANT AS AN AGGRAVATING CIRCUMSTANCE; (B) CONSIDERED THE ABOVE FACT AS AN AGGRAVATING CIRCUMSTANCE WHEN IT IMPOSED SENTENCE; AND (C) ABUSED ITS DISCRETION BY IMPOSING A DEATH SENTENCE WHEN THE AGGRAVATING CIRCUMSTANCES DID NOT OUTWEIGH THE MITIGATING CIRCUMSTANCES IN ACCORDANCE WITH THIS COURT'S INTERPRETATIONS OF THE CAPITAL SENTENCING SCHEME.

POINT VI

WHETHER FLORIDA'S DEATH PENALTY VIOLATES CERTAIN PROVISIONS OF THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BECAUSE ARBITRARY, STANDARDLESS DISCRETION STILL EXISTS IN THE FORM OF PLEA BARGAINING, JURY FREEDOM TO CONVICT OF LESSER INCLUDED OFFENSES, AND EXECUTIVE CLEMENCY, AND IS INHERENTLY UNCONSTITUTIONAL IN THE LIGHT OF EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

V ARGUMENT

POINT I

APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE THE TRIAL COURT DID NOT GRANT A CHANGE OF VENUE SUA SPONTE, REFUSED TO ALLOW INDIVIDUAL VOIR DIRE EXAMINATION OF THE PROSPECTIVE JURORS AND REFUSED TO SEQUESTER THE JURY.

A. SEQUESTRATION

F.R.Cr.P. 3.370(a) states: "After the jurors have been sworn they shall hear the case as a body and, within the discretion of the trial judge, may be sequestered." Although capital cases receive no special treatment in the Court Rule, the traditional common law rule requiring sequestration in such cases is followed in many jurisdictions. Annot., 21 A.L.R. 2d 1089. In those jurisdictions where the trial judge is allowed to exercise discretion in deciding whether to sequester the jury, the scope of his discretion is narrower in a capital case than in other felonies and misdemeanors. Id. Even in a non-capital setting where defense counsel raised no objection and made no showing of prejudice, this Court has held that where a jury recessed for 15 hours during its deliberations, without any instructions, the defendant was deprived of fundamental rights

necessitating a new trial. Raines v. State, 65 So. 2d 558 (Fla., 1953). The Florida Constitution, Article I, Section 16, guarantees an accused the right to a public trial by an impartial jury. That guarantee was strained beyond its limits when, for example, juror Starling was allowed to return home after each day of trial and meet with her husband who had been preemptorily excused by defense counsel when the jury was selected. See appendix A.

B. INDIVIDUAL EXAMINATION

Defense counsel's second motion was a request that he be allowed to voir dire the venire memebers individually so that those who had specific knowledge of the crime would not contaminate the others' minds (TR-33,34). That motion was also denied (TR-73). Defense counsel's fears were realized throughout the voir dire examination. The most flagrant example is undoubtedly prospective juror Tusky's remark: "I feel that the defendant is guilty" (TR-105). While juror exposure to information about a defendant's prior convictions (easily deduced here by certain prospective jurors' statements that they had known appellant while he was being held by the Division of Corrections; see appendix A) or the news accounts of the crime with which he has charged do not alone presumptively

deprive a defendant of due process, Murphy v. Florida, __U.S.__, __S.Ct.__, 44 L.Ed. 2d 589 (1975), the expression of actual prejudice will have that effect. Id. at 596,597. Here, defense counsel attempted to avoid reinforcing any possible prejudices by questioning each prospective juror individually. In this manner he hoped to avoid the pitfall of defense counsel in Murphy. 44 L.Ed. 2d at 595, fn. 3.

Appellant recognizes that allowance for voir dire examination individually and outside the presence of remaining prospective jurors is discretionary with the trial court. Branch v. State, 212 So. 2d 29 (2 D.C.A., Fla., 1968). See generally 50 C.J.S. Juries, §276 c. Unlike Branch this is a case where the trial court abused its discretion by not allowing individual examination such as occurred in Silverthorne v. United States, 400 F.2d. 627, 639-644 (9th Cir., 1968) and Commonwealth v. Johnson, 440 Pa. 342, 269 A.2d 752 (1970). The following oft-quoted language of Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961) has application to appellant's case:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. Re Oliver, 333 US 257, 92 L ed 682, 68 S Ct 499; Tumey v Ohio, 273 US 510, 71 L ed 749, 47

S Ct 437, 50 ALR 1243. 'A fair trial in a fair tribunal is a basic requirement of due process.' Re Murchison, 349 US 133, 136, 99 L ed 942, 946, 75 S Ct 623. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155b. His verdict must be based upon the evidence developed at the trial. Cf. Thompson v Louisville, 362 US 199, 4 L ed 2d 654, 80 S Ct 624. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender of the station in life which he occupies." 366 U.S. at 722.

C. VENUE

Union County, Florida, is a small rural county having a total estimated population at the approximate time of trial of 10,395. Division of Population Studies, Bureau of Economic and Business Research, University of Florida, estimate as of July 1, 1975. That figure includes the populations of two of the state's major penal institutions: The Reception and Medical Center, Lake Butler, Florida (population 1,859 as of June 30, 1975) and the Union Correctional Institution, Raiford, Florida (population 2,001 as of June 30, 1975). Annual Report 1974-75, Florida Division of Corrections, pages 24 and 25. The number of registered voters in Union County on December 1, 1975 is believed to

have been 2,631. Affidavit of Lottie Lu Archer, Supervisor of Elections. Florida State Prison is located in Bradford County which lies adjacent to Union County's eastern boundary. The rehabilitation of offenders provides a major source of revenue, either directly or indirectly, for the residents of Union County. Given these factors it is not surprising that prospective juror Joe Forsyth, an employee of the Division of Corrections (TR-12,13,57), knew appellant personally for ten years while appellant was incarcerated in one or more of Union County's correctional institutions. And Joe Forsyth's cousin, prospective juror Tom Forsyth, who is employed at the Union Correctional Institution (his wife works at the Reception and Medical Center and is kin to Sheriff Whitehead) first met appellant 15 years ago while working as a correctional officer (TR-176,178). See appendix A.

Appellant did not file a F.R.Cr.P. 3.240 motion for change of venue based upon these factors and the pretrial publicity that accompanied the first degree murder charge. Perhaps the reason for his not filing such a motion was because, insofar as this writer has been able to determine, a Florida appellate court has only once ruled that a trial court abused its discretion by not allowing a change of venue. Oliver v. State, 250 So. 2d 888 (Fla., 1971).

Sheperd v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L. Ed. 2d 600 (1966), implies that a State trial court is under an obligation to provide a defendant with a fair trial. There the court stated:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances." 384 U.S. at 362.

Appellant recognizes that this Court has held in Hawkins v. State, 206 So. 2d 5 (Fla., 1968) that a motion for change of venue is addressed to the sound discretion of the trial court. However, in Hawkins, contrary to the case at bar, the defendant did not exhaust all of his preemptory challenges in attempting to arrive at a jury made up of persons who were not familiar with the case for one reason or another. See appendix A; F.R.Cr.P. 3.350 (a). Even without that distinguishing fact, this Court should recede from its traditional approach of reviewing venue considerations only whre it appears that a motion for change of venue has been made and the trial court has abused its discretion for disallowing the motion.

The language taken from the Sheperd opinion underlined above indicates that it is now the duty of a reviewing Court to make an independent eveluation of the facts to ensure that a defendant receives a fair and impartial trial. Maine v. Superior Court of Mendocino County, 66 Cal.Rptr. 742, 68 Cal.2d 375, 438 P.2d 372 (1968). See generally Annot., 33 A.L.R. 3d 17.

Assistant Public Defender Dunham did present the trial court with two motions relating to the problem of pretrial publicity. His first request was that the trial court sequester the jury:

> "MR. DUNHAM: Your Honor, at this time I have two positions I want to make.
>
> The Court earlier made announcement on decision, I believe. There had been an oral motion before the Court sometime back when this case was originally set for trial on the part of the Defendant for the jury to be sequestered during the course of this trial. The Court made its announcement to the Venire and I went back -- the State Attorney was not present and I wanted the State Attorney to have an opportunity to hear my motion and respond. The grounds for this motion, of course, are the fact that number one, Union County is not a largely populated county. There is indication by the first twelve people that they did, in fact, have some knowledge of this case. I don't think there is any doubt that the Jacksonville newspapers, the Gainesville newspaper, and the

local paper have reported this case ever since Jacqueline Smith was reported missing. Under the circumstances and due to the fact that we have a small county, I don't think -- the population is somewhere between four and five thousand.

THE COURT: It's a little more than that now.

MR. DUNHAM: Because of the population, because of the coverage of the media, because of the local public interest in this case, the fact that the victim in this case was a resident of the county, a mother with children. A working mother of the community and because of the great interest that has been expressed, I have received indications from the various people in the Clerk's office that they oftentimes during the course of the preparation of the trial receive calls from various members of the community, people stopping by wanting to know when the case is coming to trial. What is going to happen. Things of that nature.

We are dealing with a most serious offense under the laws of the State of Florida. This is first degree murder. With all the circumstances I would orally move the Court to order the jury be sequestered once it is sworn in for the duration of the course of the trial." (TR-30-32)

The trial court denied the motion, but this Court will note that neither the judge nor the prosecutor challenged defense counsel's statements concerning pretrial publicity. The only expressed difference of opinion concerned the population of Union County (TR-31). The trial court's

reasons for not sequestering the jury were as follows:

> "I do not intend to sequester the jury, by sequester the common lock the jury up. There aren't any motels or hotels in Union County that could accomodate the twelve person jury. You would have to be transported to Columbia County or to Bradford County and I carefully examined the situation and I do not believe that it is essential to the fair administration of justice because I believe that you can follow the Court's instructions that it will give later on, and not talk about this case." (TR-8)

The fact that there is not a single motel in Union County is further evidence of its small size and isolated location. In the court's own words, "[j]ust about everybody has heard something about the case" (TR-19).

In conclusion, appellant respectfully submits that the trial court erred by not granting a change of venue sua sponte, in not ordering sequestration of the jury, and in not allowing the prospective jurors to be questioned individually. For any one or all of these errors a new trial must now be granted with such instructions as this Court deems necessary to ensure future compliance with the United States Supreme Court's interpretations of the Sixth and Fourteenth Amendments, United States Constitution.

POINT II

APPELLANT WAS DENIED DUE PROCESS OF LAW WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE THE TRIAL COURT RULED THAT A CONFESSION OBTAINED IN CONTRAVENTION OF THE PRINCIPLES ENUNCIATED IN MIRANDA V. ARIZONA WAS ADMISSIBLE IN EVIDENCE.

Appellant filed a motion to suppress the confessions pursuant to the provisions of F.R.Cr.P. 3.190(i) and a hearing was held on the motion on June 27, 1975 (MS-1). Testimony elicited at the hearing (and summarized above) indicates that appellant was first taken into custody in Missouri under the authority of a detainer presumably lodged pursuant to the provisions of §941.45, F.S. Appellant's conviction was affirmed on direct appeal. Stone v. State, 245 So.2d 91 (1 D.C.A., Fla., 1971). He sought relief on a F.R.Cr.P. 3.580 motion to have the Court's ruling in Franklin v. State, 257 So. 2d 21 (Fla., 1971) apply retroactively to his sodomy conviction. Relief was denied in Florida courts. Stone v. State, 264 So. 2d 81 (1 D.C.A., Fla., 1972), cert. den., 267 So. 2d 329 (Fla., 1972). Appellant sought and received relief in a Federal District Court and the Court of Appeals, Fifth Circuit. Wainwright v. State, 478 F.2d 390 (5th Cir., 1973). The United States Supreme Court reversed the Fifth Circuit Court of Appeals. Wainwright v.

Stone, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed. 2d 179 (1973). It was subsequent to that holding that appellant's custody was sought by the Division of Corrections (MS-60,61). Appellant's automobile accident in Missouri triggered a routine ID check and special agent Scott from the Division of Corrections was sent to Missouri to take custody of appellant. It was not until after he arrived in Missouri that Agent Scott learned that appellant was being sought as a murder suspect (MS-61). Appellant was advised that he was a suspect on a murder charge (MS-28), but he was never taken before a "booking officer" or a magistrate (MS-5). Appellant feels that it was special agent Scott's duty to to place him in communication with his attorney in Missouri or the Public Defender's Office in Leon County (Second Judicial Circuit) or Union County (Eighth Judicial Circuit) when appellant was being transported back to prison as a prime suspect in a murder charge. F.R.Cr.P. 3.111(c) provides:

> "(c) Duty of Booking Officer.
>
> In addition to any other duty, the officer who commits a defendant to custody has the following duties:
>
> (1) He shall immediately advise the defendant:
>
> (i) of his right to counsel;
> (ii) that if the defendant is to pay a lawyer, one will be provided immediately at no charge.

(2) If the defendant requests counsel, said officer shall immediately and effectively place said defendant in communication with the (office of) Public Defender of the circuit in which the arrest was made.

(3) If the defendant indicates he has an attorney or is able to retain an attorney, the officer shall immediately and effectively place said defendant in communication with his attorney or the Lawyer Referral Service of the local bar association.

(4) The Public Defender of each Judicial Circuit may upon being contacted by, or on behalf of a defendant who is, or represents himself to be indigent as defined by law, forthwith interview said defendant and

(i) If the defendant is in custody and reasonably appears to be indigent, the Public Defender shall tender to him such advice as is indicated by the facts of the case; seek the setting of a reasonable bail and otherwise represent such defendant pending a formal judicial determination of indigency.

(ii) If the defendant is at liberty on bail or otherwise not in custody, the Public Defender shall elicit only such information from the defendant as may be reasonably relevant to the question of indigency and shall immediately seek a formal judicial determination of indigency. If the court finds the defendant indigent, it shall immediately appoint counsel to represent said defendant."

The term "booking officer", as it is used in the Rule,

simply means the officer who places a defendant in custody. Agent Scott committed appellant to custody in Missouri. Instead of complying with the letter and spirit of the Rule, Agent Scott refused to return to appellant the business card listing the name and address of his attorney in Missouri (MS-5,8,29-32,63,64). They flew back to Florida and appellant was placed in the Leon County jail in Tallahassee, where he remained for five or six days (MS-7,62). He was then returned to Union County. All of this time he never had the benefit of defense counsel's advice. Appellant was told that he did not need an attorney because he had not been charged with a crime (MS-14,50). Instead of being "immediately and effectively" placed in communication with the Public Defender's Office, appellant was told that a "court would have to appoint an attorney"(MS-50).

Undoubtedly, a judge would have appointed counsel had appellant been taken "...before a judicial officer within twenty-four (24) hours of his arrest" as contemplated by this Court's F.R.Cr.P. 3.130(b). He would have been advised that he had "a right to communicate with his counsel...and that, if necessary, reasonable means [would] be provided to enable him to do so." F.R.Cr.P. 3.130(b)(2)(iii).

Instead, appellant was kept incommunicado. Sheriff

Whitehead admitted that appellant became a murder suspect on August 23, 1974, "a few hours" after the Sheriff arrived at the victim's house. On that same day Sheriff Whitehead issued a "BOLO" specifically mentioning appellant (MS-77).

Appellant was first questioned at length at RMC on September 10, 1974 (MS-79,106,110). He was advised of his Miranda rights. He denied any knowledge of the crime (MS-80). Six days passed. Suddenly, at 6:30 a.m. (4:30 a.m. by appellant's account, MS-11) on September 16, 1974, Sheriff Whitehead and Agent Joe Uebelher came to his prison cell, awakened him and stated for the first time that he was to take a polygraph examination in Orlando, Florida (MS-80, 107). Agent Moniack administered the examination. Agent Uebelher described what occurred as follows:

> "Q. [Assistant Public Defender Dunham]*** Were you called back into the room where the exam was run after Mr. Moniak had finished -- concluded his polygraph examination?
>
> A. [Uebelher] I was there at the very beginning and called back at the end, yes, sir.
>
> Q. All right. And <u>in your presence did Mr. Moniak make any statement as to his opinion of the results of the polygraph examination</u>?
>
> A. <u>Yes, sir. He did</u>.
>
> Q. What did he say as best as you can recall?

A. The best I can recall he told me that after conducting a polygraph examination and it was his opinion that Mr. Stone was responsible for the death of Jacqueline Joanne Smith.

Q. All right. Did he then shortly thereafter leave the room?

A. Yes, he did.

Q. Who was remaining in the room at that time?

A. Sheriff Whitehead and myself. And Mr. Stone.

Q. How about Agent Wolf?

A. Agent Wolf was not present at that time, no, sir. He probably would have but he was not immediately in the vicinity when Charlie Moniak came out. He was somewhere else.

* * *

Q. All right. Now, getting back to that same crucial time period that is before you went on the spool tape or the tape that was in the room in which Mr. Stone agreed to go on tape. Was there a time period during which Mr. Stone made a statement implicating guilt and knowledge of the death of Jackqueline Joanne Smith something to the effect of, 'All right, I did it,' or, 'All right. I killed her.'?

A. Yes. Shortly after Agent Moniak left within just minutes, he said, 'All right. I killed her.'

Q. Well, was there anything leading up to that?

A. Oh, yes. We talked to him.

Q. For about how long before he made that statement?

A. I would say just a couple of minutes.

Q. All right. Prior to his making that statement from the time Mr. Moniak left up until that time was he at any time either orally given his Miranda rights and warnings and did he make a waiver or did anyone have him sign any written rights or waiver?

A. Well, let me go back. I advised him multiple occasions on the 10th. I was present that morning when he was advised of his rights a short time earlier when I went back in after the polygraph. I then did not again advise him of his rights, no, sir." (MS-112-113,117-118)

Interestingly, appellant was finally allowed to speak with his attorney in Missouri after the polygraph examination, after the confession, after he showed the police the location of a hatchet and bloody car brackets, on the way back to prison from Orlando (MS-53,85,86).

The following excerpts are taken from the United States Supreme Court decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) and are pertinent to this cause:

"Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, 'Since Chambers v. Florida, 309 U.S. 227 [84 L ed 716, 60 S Ct 472], this Court

has recognized that coercion can be mental as well as physical, and that the clood of the accused is not the only hallmark of an unconstitutional inquisition.' Blackburn v. Alabama, 361 US 199, 206 4 L ed 2d 242, 247, 80 S Ct 274 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn resultes in a gap in our knowledge as to what in fact goes on in the interrogation rooms.

* * *

We have recently noted that the privilege against self-incrimination--the essential mainstay of our adversary system--is founded on a complex of values, Murphy v Waterfront Comm'n, 378 US 52,55-57, note 5, 12 L 3d 2d 678, 682, 84 S Ct 1594 (1964); Tehan v. Shott, 382 US 406, 414-415, note 12, 15 L ed 2d 453, 459, 86 S Ct 459 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government --state or federal--must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simply expedient of compelling it from his own mouth. Chambers v Florida, 309 US 227, 235-238, 84 L ed 716, 721, 722, 60 S Ct 472 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his

will.' Malloy v. Hogan, 378 US 1, 8, 12 L ed 2d 653, 659, 84 S Ct 1489 (1964).

* * *

The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-estbalished atmosphere are not the produce of compulsion.

* * *

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who must require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional.' Brief for the National District Attorneys Association as amicus curiae, p. 14. Even preliminary advice given to the ac-

cused by his own attorney can be swiftly overcome by the secret interrogation process. Ef. Escobedo v Illinois, 378 US 478, 485, note 5, 12 L ed 2d 977, 983, 84 S Ct 1758. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

* * *

If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

* * *

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver or rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

* * *

> The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point." (Emphasis added.) 384 U.S. 448,460,466,469,470, 474,476, and 477.

A. PSYCHOLOGICAL FACTORS

At the conslusion of the hearing on the motion to suppress defense counsel summarized the evidence which demonstrated a psychologically coerced atmosphere. Counsel stated:

> "He was brought to Florida and he was held in the state prison. It's legal. No doubt about that, but it's not like a pre-trial detainee who is being held in the county jail that has access to phones, that has visiting hours that he can get to the outside world. In fact, from the 10th of September when he arrived in the state of Florida until the 16th of September when he made the first admission, the all right, I did it, or the all right, I killed her, on the 16th of September, he was held incommunicado. He was interrogated for at least, by the testimony of the witnesses, I understand on the 10th, an hour in the morning and three or four hours in the afternoon on the 10th, at which time by their statements, he did not implicate

himself or make any incriminating statements in relation to the disappearance. Then, and we have an inconsistancy here and I think it's important because, of course, there is no doubt that there was conflicts in testimony. What Mr. Stone has said conflicts with much of what the FDLE agent and the Sheriff said about whether or not he inquired and asked about an attorney and what he was told and what was said. However, Mr. Uebelher, who seems to be the one who was the one to inform Mr. Stone of the polygraph, the inconsistancy being that the Sheriff insisted that Mr. Stone was made aware of the polygraph. It was arranged and he agreed to take it on the 10th when Mr. Uebelher said that he didn't think it was possible that it could possibly be done and the best he remembers it was done at six-thirty in the morning on the 16th of September.

At that time with the Sheriff and two FDLE agents he was taken to another law enforcement agency. He was given a polygraph examination. He was told -- you have read the testimony of Mr. Moniak. You have heard the testimony of the others that after the results of the examination, he was told, in effect, you flunked. He was told in my opinion that he was not telling the truth on the examination and that he was responsible for the death of Jacqueline Joanne Smith. He left and there was some conversation between the Sheriff and the other agents in the room and it was at that point, at that point alone where he made the first admission, 'All right, I did it.'" (MS-139-141)

"Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." Miranda v. Arizona, supra at 384 U.S. 448. We will

probably never have all the facts as to what occurred when appellant was suddenly awakened in his prison cell during the early morning hours of September 16, 1974, and whisked away to Orlando for a polygraph examination. Appellant was told that he fluked the test. Then the police "talked to him" (MS-117).

B. ABSENCE OF COUNSEL DESPITE REPEATED REQUESTS

"The presence of counsel...would ensure that statements made in the government-established atmosphere are not the produce of compulsion." Id. at 384 U.S. 466. If appellant's testimony is believed, it appears that he made attempts to get in touch with an attorney from the moment he was placed in custody in Missouri until after his confession when he was finally allowed to make a long distance telephone call to Missouri to speak with an attorney. Even State's witness Wayne Scott acknowledged that appellant, on at least two occasions before he was transported to Lake Butler, requested his attorney's business card. It was refused him (MS-63). Agent Scott told Sheriff Whitehead and Agent Ubelher of these requests, but nothing was done about them (MS-64). Sheriff Whitehead "explained to him that the prison people had to approve that but that if we got him outside for any purpose or reason we would let him make the call" (MS-96).

Appellant was allowed to make a telephone call--after he confessed.

In State v. Prosser, 235 So. 2d 740 (1 D.C.A., Fla., 1970), cert.den. 243 So. 2d 419, the Court reviewed an appeal from an order granting the defendant's motion to suppress certain oral and written statements. The record indicated that the defendant had made various ambiguous statements concerning his desire to have an attorney present. The Court quoted portions of the record and the Miranda opinion and then stated:

> "Under the doctrine laid down in the Miranda case, as quoted above, the interrogation must cease if, after the warnings have been given, the defendant 'indicates in any manner that he wishes to remain silent or that he wishes to consult with an attorney.'" Id. at 742.

The Court then affirmed the trial court judgment suppressing the confessions. Id.

C. TIME LAG FOLLOWING MIRANDA WARNINGS

Six days elapsed between the time appellant received Miranda warnings on August 10, 1974, and his confession to Sheriff Whitehead and Agent Uebelher following the polygraph examination on September 16, 1974 (TR-117). One Florida court has already expressed an opinion concerning admissibility of a confession in such circumstances. In

Nettles v. State, 248 So. 2d 259 (2 D.C.A., Fla., 1971) the defendant confessed to a probation officer following his arrest and waiver of Miranda rights six days earlier. The Court stated:

> "The defendant's confession to his probation officer was made on February 5, 1970, while in jail. A waiver of Miranda rights was given to a detective six days prior to the date the defendant confessed to his probation officer. We do not believe that this warning was sufficient to prohibit violation of defendant's constitutional rights under the Miranda warnings." (Emphasis added.) Id.

The Court affirmed the conviction by holding that even in the absence of timely Miranda warnings the statements were admissible because they had been given to the defendant's probation officer during the term of his probation. Id. at 260. Cf. Walls v. State, 279 So. 2d 95,96,97 (2 D.C.A., Fla., 1973) where the defendant was given warnings on a "prior occasion", but was subsequently interviewed without Miranda warnings and gave a confession: "Clearly, the confession could not have been admitted in evidence in behalf of the State's case in chief."

Appellate courts in different jurisdictions have interpreted the Miranda holding in various ways. See Hanney, The Need to Repeat Miranda Warnings at Subsequent Interrogations, 12 Washburn L.J. 222 (1973). However, appellant has discovered a decision from another jurisdiction which is virtually "on

all fours" with the facts presented here. In Brown v. State, 6 Md. 564, 252 A.2d 272 (1969) the defendant was first taken into custody on February 18, 1968, was given Miranda warnings, and gave local police officers Evans and Lashley an exculpatory statement at that time. The following day he was driven to state police barracks 50 miles away for further interrogation. Note the following facts:

> "At the barracks Brown was questioned for an hour by Sergeant Stafford, a lie detector expert of the Maryland State Police. Stafford did not give the Miranda warnings because he was informed that Brown had already been given the warnings which, in absence of direct evidence, we must assume to be the warnings of the night before. After one hour of questioning, Stafford turned Brown over to the State Attorney. ***Brown, after warnings, then repeated to the State's Attorney, Evans, and Lashley, what he had told Stafford earlier. The interrogation lasted from 4:10 to 4:47 p.m. wherein Brown gave an inculpatory statement.
>
> * * *
>
> Brown testified that he asked the State's Attorney for an attorney the first night after he had received his Miranda warnings, and the next day while he was at LaVale. When Brown returned from LaVale he again asked for an attorney at which time the State's Attorney called one for him, but the attorney refused to accept the case. The State's witnesses testified that Brown did not ask for an attorney until he returned to LaVale. The court stated that it

> believed the witnesses for the State and not Brown, and admitted the statement. Brown contends that it was error to admit his confession into evidence and we agree." (Emphasis added.) Brown v. State, supra, at 252 A.2d 274,275.

The Maryland Court "agree[d] with the cases which hold that the Miranda warnings need not be given anew nor the Miranda waiver expressed each time the officers question an accused." Id. The Court nevertheless felt compelled to reverse and remand the cause for the following reason:

> "We think the circumstances in the case at bar did not justify the trial judge's implicit finding that Brown knowingly and intelligently relinquished his constitutional rights. We point to (1) time lapse, (2) the distance to the location of the second interrogation, (3) the difference in interrogators, and (4) to the difference in the statements obtained. We note particularly that after Sergeant Stafford talked with him the second time, at dinner, Brown made even more incriminating statements than he had made prior thereto, i.e. for the first time on the record he admitted actually stabbing the victim. The record does not disclose what Sergeant Stafford said at either interview. One of Miranda's strongest teachings is that waiver of constitutional rights cannot be found from a silent record." (Emphasis added.) Id. at 276.

Every emphasized portion of the quoted opinion above bears striking resemblance to what occurred to appellant.

The companion case to Brown is Franklin v. State, 6 Md. App. 572, 252 A.2d 487 (1969) where the State sought to

introduce certain incriminating statements in rebuttal and not as part of its case in chief in a robbery prosecution. The Court relied on Brown, supra, and stated:

> "We think it clear from the evidence that before Sergeant Tabeling interrogated appellant on September 4, 1976, he complied fully with the Miranda requirements. While Detective Currelli testified that on September 5 he advised appellant 'of his rights' prior to interrogating him, such unparticularized testimony is insufficient to demonstrate compliance with the Miranda decision. See Hale v. State, 5 Md.App. 326, 247 A.2d 401. And there was no evidence of any kind that appellant was advised of his Miranda rights, and a waiver thereof secured, on September 6 when appellant made his incriminatory statement that he robbed the Arundel store. We think it plain from the record that appellant, was in police custody at that time, as he was then under arrest and in a police car. Although it is not entirely clear that the statement was made in response to interrogation by the police, see Campbell v. State, 4 Md.App. 448, 243 A.2d 642, we think the circumstances were such as to implicitly indicate that appellant's statement was responsive to custodial questioning by the police. Even though appellant was fully advised on September 4, of his Miranda rights, he was subjected to further custodial interrogation on September 5 and 6 without, insofar as the record shows, again being afforded the requisite warnings and an effective waiver of his rights being secured;

> and while it may not be necessary in all circumstances to restate the substance of the Miranda warnings at each successive interrogation, we believe that in this case, where the state obtained a statement on September 6, proof showing only that the Miranda warnings were given on September 4 would fall short of compliance with the dictates of the Miranda decision. See Brown v. State, [supra]." Franklin v. State, supra, 252 A.2d 490,491.

In conclusion, appellant respectfully submits that the trial court erred by not granting defense counsel's motion to suppress appellant's inculpatory statements and for that reason the judgment and sentence imposed by the trial court must now be reversed and the cause remanded for retrial.

POINT III

APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE THE TRIAL COURT ALLOWED INTO EVIDENCE PIECES OF BONE, BLOOD SAMPLES, AND EXPERT TESTIMONY RELATING TO SAID EXHIBITS.

A. BONES

The trial court allowed into evidence a portion of a human skull and portions of other bones that were found on December 6, 1974, 200 yards west of a certain bridge lying on the north bank of the Santa Fe River (TR-473,476,478,541). Those bones were found over three months after the body was discovered. The bones were admitted into evidence following the testimony of Dr. William Maples, physical anthropologist. He identified the portion of the human skull as being a "calva" (TR-500). Dr. Maples performed certain tests on the skull and made a report indicating that it was from 45 to 55 years old (TR-513). At trial he extended that range from "just below 40 to right around 60" (TR-535). In his opinion the calva came from the body of a white woman (TR-502), although it could have belonged to a man of a different race (TR-533, 534). Defense counsel argued that the bones and Dr. Maples' testimony be excluded as being irrelevant. Counsel stated:

> "The Defendant has been charged in the indictment with the death of Jacqueline

Joanne Smith. At this point there has been no identification of any deceased as being the actual victim number one. If in fact basing my understanding of the State's case from its opening statement, which I think are reasonable to rely on as what he intends to prove, he apparently intends to show that Jacqueline Joanne Smith was hit over the head by a blunt instrument and thrown to the river. As of this time at least, there has been no connection between the skull that they are talking about and Jacqueline Joanne Smith, the victim in this case. There has been no typing -- as a matter of fact there has been no identifying of the deceased's body at this point as belonging to Jacqueline Joanne Smith let alone connecting the body belonging to her with a skull in an attempt to prove how death occurred. This expert and he is highly qualified and I'm sure he knows his field of study, has testified that if this falls within the norms of a female that it could be a male outside of the norms. It's possible. That it is within the norms of Caucasoid race but he gave some further elaboration that once again it's possible that it could be another race. Thirdly, that the age range that he gave possibilities went from forty at the low end of the scale and sixty at the other end of the scale, a total of twenty years. This is not in my opinion from what I have heard form his testimony the type of exact science where there is absolute certainty. He only has a small piece of skull. He doesn't have more to work with. I don't believe that the relevancy of that skull other than the fact that it was found in the same river downstream from the bridge has been shown. His testimony is that it could have been there for as long as five years. Or a few weeks. This skull was not by the other witnesses' testimony found until some, I believe, -- let's see." (Emphasis

added.) (TR-519-520)

The Court allowed the skull and other bones into evidence (TR-541).

There is not a large body of case law treating issues involving the sufficiency and competency of evidence to prove identity of a corpse or a portion thereof. Most of the cases deal with chain of custody problems that arise when portions of a body are removed for analysis. Annot., 21 A.L.R. 2d 1216. For example, in Larmon v. State, 81 Fla. 553, 88 So. 471 (1921) this Court ruled that it was not error to allow a skull into evidence where "[i]t was fully identified by a skilled physician and surgeon who amputated it from the body of the deceased, and who testified that it had been kept in his person ever since." Id. at 81 Fla 555.

All such evidence falls within the general classifcation of "demonstrative evidence" and such evidence tends to have substantial persuasive impact on a jury. As is stated in Florida Jurisprudence:

> "Demonstrative evidence is of the highest rank, and is sometimes said to be the ultimate test of truth. This is because it is addressed directly to the senses. Thus, mathematics belongs to the class of demonstrative evidence, for a proposition in mathematics may be established by the evidence of one's own senses. The importance of this class

> of evidence cannot be minimized. Of course, like other kinds of evidence it must be relevant to the issues being tried." 13 Fla. Jur., Evidence, §284.

See also Torcia, Wharton's Criminal Evidence, §635 (13 Ed., 1973): "To be admissible, the real evidence must be in substantially the same condition as at the time of the crime; must be properly identified; and must be relevant." Even in civil cases this Court has held that such evidence must only be admitted into evidence after the trial court has carefully ensured that it is genuine. See, e.g., Hancock v. State, 90 Fla. 178,184, 105 So. 401 (Fla., 1925).

Appellant submits that the testimony presented by the State did not connect the skull to the deceased. By reason of that fact it was irrelevant. It would be difficult to characterize the display of a human skull in a murder prosecution as anything other than prejudicial and, in this case, harmful error.

B. BLOOD

Certain blood samplings were also admitted into evidence over defense objection. One was a spot of blood taken from the bridge from which the body was supposedly thrown into the Santa Fe River (TR-428,430;448;573-579). The other was a spot of "blood" removed from brackets found underneath

Mr. Gay's hous (TR-769-770;797-801). Once again the objections were directed at the irrelevant nature of the evidence and the fact that the State had not laid a proper predicate before it introduced the evidence. With respect to the "bridge blood sample" defense counsel objected as follows:

> "MR. DUNHAM: My objections for the record is the following: the only thing that the State can establish as to this piece of evidence is that it is human blood. They cannot type it. It was found on the bridge some three months later from the time that the State is alleging this death occurred. It's a small - excuse me. September the 1st it was found. Some date later. Because they cannot type it they cannot show any connection to this case. This is a public highway. Any fisherman, any hitchhiker, any one passing could have put that drop of blood on there. The reason I feel it is not relevant is because one thing the Court also has to determine -- in determining relevancy and the prejudicial effect to this jury at this point has. They have got a body that hasn't been identified. They have got a skull that hasn't been connected and now they have got a drop of blood any one of which - the jury is not trained in the law. The jury is convinced that that is Jacqueline Smith's body. That is her skull. And that is her drop of blood. The prejudicial effect of allowing this kind of evidence is going to -- there is no way that the jury -- the prejudicial effect on this, the jury -- there is no way they are going to be able to reach a fair and impartial verdict." (TR-576-578)

With respect to the "bracket blood staining" defense counsel object as follows:

> "MR. DUNHAM: Having had an opportunity previously to be apprised of the laboratory results of these plastic brackets among other things, it's my understanding that the State can, in fact, prove that at least on one of these brackets in question there was blood-staining and the report didn't even say if it was human or not. This is my understanding or, if Mr. Hebert has other evidence I'm sure that would be a different story, but they come to the same conclusion as the drop of blood on the bridge. That is one says bloodstaining and the other is human blood but that further results are not conclusive. That means that the blood cannot be typed. If the blood cannot be typed, I maintain there is all kinds of blood. People bleed all over the place. I don't mean that to be funny but blood appears in lots of different places. The prejudicial effect of having the jury hear yet another piece of evidence about blood or dead bodies is just overwhelming. I think that if the State is going to produce something of this nature they are going to have to connect it either to the Defendant's blood or Mrs. Smith's blood or something of that nature and not just run around and find as much blood as they can to identify and put it in this trial to convict this man. I object to it." (Emphasis added.) (TR-771-773)

For the reasons set forth under "A" above, appellant submits that the trial court erred by allowing these blood samples into evidence. When an expert witness cannot determine whether certain material came from a human being

or a mosquito (TR-799), it is time to call a halt to the parading and pyramiding of irrelevant evidence that has meaning only insofar as it can shock and otherwise influence a jury's collective conscience.

POINT IV

APPELLANT WAS DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WHEN THE TRIAL COURT ALLOWED CERTAIN TAPED CONFESSIONS TO BE PLAYED TO THE JURY BEFORE THE STATE HAD ESTABLISHED THE CORPUS DELECTI OF THE CRIME ALLEGED.

In homicide cases, the corpus delicti consists of three elements: The fact of death, the criminal agency of another person as the cause thereof, and the identify of the deceased. Lee v. State, 96 Fla. 59, 117 So. 699 (1928). In these cases the term corpus delicti encompases a dual aspect. First, the State must introduce sufficient evidence tending to prove these three essential elements before the jury will be permitted to consider any admission or confession of a defendant. Appellant acknowledges that when the term is used in this sense there is no requirement for proof of the elements beyond a reasonable doubt. The second requirement is that at the conslusion of all the evidence in a particular case there must be proof beyond a reasonable doubt of the essential elements of the corpus delicti. These different standards were explained in some detail by this Court in Jefferson v. State, 128 So. 2d 132, 135 (Fla., 1961). This appeal concerns whether the State met its burden with respect to the first

requirement or as this Court once put forth the issue: "The question is whether the evidence of corpus delicti is prima facie sufficient to authorize the admission of the confession." Schneble v. State, 201 So.2d 881, 883, 884 (Fla., 1967), vacated on other grounds, 392 U.S. 298, on remand 215 So. 2d 611, affirmed 405 U.S. 427.

Appellant's objection at trial as to the lack of sufficient evidence to admit the confession is set forth in 13 pages of transcribed record (TR-626-639). Defense counsel conceded the first element, i.e., the fact of death (TR-629).

Appellant argued that the second element was not sufficiently proven because the body was badly decomposed and beyond recognition. The skull was missing. A portion of a skull was introduced into evidence over defense objection (Point IV above.) It was found three months after the body was discovered and over 200 yards from it on the opposite bank of the river (TR-634). X-rays purportedly depicting the spinal area of Jackqueline Smith's back were allowed into evidence, but the chain of custody of these x-rays contained several weak links (TR-629-630). There appeared to be a significant difference between the x-rays and the corpse in that the corpse contained metal sutures while the operational report of the laminectomy operation performed on Jackqueline Smith made no mention

of metal sutires (TR-630).

The third element was also insufficiently proven. Dr. Beamer would not rule out drowning as the cause of death. "Without the head and the hands [he] was not able to define the cause of death" (TR-599). The blows which were delivered to the calva (which may have belonged to Jackqueline Smith) could have been delivered four to six hours after death (TR-611).

Then there was the evidence as to blood staining taken from the bridge. The blood could not be typed. It was simply a drop of blood on a bridge along a public highway (TR-632-633). There was simply insufficient evidence to determine where the body met what kind of death.

The rule regarding the establishment of a corpus delicti as a prerequisite to the introduction of a confession has been applied on several occasions by appellate courts in various types of prosecutions. In McQueen v. State, 304 So. 2d 501 (4 D.C.A., Fla., 1975), cert.den. 315 So. 2d 193, the Fourth District Court of Appeal reversed a conviction for buying, receiving, or aiding in the concealment of stolen property by holding a confession admissible. The Court stated:

> "Although, as the state contends, the corpus delicti rule does not require the establishment of all the elements

> of the crime, Pickett v. State, Fla. App. 1967, 202 So. 2d 203,205, it does require, at a minimum and as we have seen, proof that a crime has in fact been committed." Id. at 503.

In Kirsner v. State, 308 So. 2d 567 (3 D.C.A., Fla., 1975), the Third District Court of Appeal reversed a conviction on the same charge as in McQueen by holding a confession inadmissible because the corpus delicti of the crime had not been established. In Smart v. State, 274 So. 2d 577 (2 D.C.A., Fla., 1973), the defendant's convictions on several counts of breaking and entering an automobile and grand and petit larceny were reversed because of insufficient competent evidence to establish a corpus delicti apart from a statement which was taken of the defendant. In each of those last three cases the defendants wer ordered discharged.

In conclusion, appellant respectfully submits that there was insufficient evidence to establish the corpus delicti necessary before appellant's incriminating statements could be entered into evidence. For the foregoing reasons, the judgment and sentence must be reversed and appellant must be ordered discharged.

POINT V

APPELLANT WAS DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WHEN THE TRIAL COURT: (A) ALLOWED THE PROSECUTING ATTORNEY TO URGE THE JURY TO CONSIDER THE FACT THAT A CAPIAS HAD BEEN ISSUED ON APPELLANT AS AN AGGRAVATING CIRCUMSTANCE; (B) CONSIDERED THE ABOVE FACT AS AN AGGRAVATING CIRCUMSTANCE WHEN IT IMPOSED SENTENCE; AND (C) ABUSED ITS DISCRETION BY IMPOSING A DEATH SENTENCE WHEN THE AGGRAVATING CIRCUMSTANCES DID NOT OUTWEIGH THE MITIGATING CIRCUMSTANCES IN ACCORDANCE WITH THIS COURT'S INTERPRETATIONS OF THE CAPITAL SENTENCING SCHEME.

A. THE MEANING OF "UNDER SENTENCE OF IMPRISONMENT."

As explained under Point III above, appellant was first taken into custody in Missouri after the United States Supreme Court ruled that he had been improperly discharged by a Federal District Court from a sodomy conviction. Appellant was detained by Missouri authorities apparently in accordance with procedures set forth in Section 941.45, F.S. Defense counsel made reference to a "capias" when he made the following argument to the trial court:

> "Thank you, Your Honor. My objection -- referring, or course, to Florida statute 921141, 5A. That is the first aggravating circumstance listed under the statute, Mr. Hebert's argument was that he felt he had a right to either put in evidence and/or

argue going to 5A. As I understand it, since there was a capias out for the return of the Defendant to finish his sentence under the Division of Corrections of the State of Florida based on a reversal in the Federal Court, that he was at the time the murder was committed under sentence of imprisonment. My objection is to any evidence or any comment going to that particular aggravating circumstance. I don't believe that that is what the Legislature intended in the statute. I don't think the plain meanings of the words indicate that. It says under sentence of imprisonment. The man, I don't think anyone can doubt, at the time was a free man. He had been released under a writ of habeas corpus by a Federal Court. He was not on probation. He was not on parole. He was not an escapee. He was legally out. I maintain that he was not again under sentence of imprisonment until the time he was actually made aware that he was arrested on the charge. There is no evidence to indicate that he was aware of it. I don't think that is a technical point. The whole thing is, every individual, of course, under our constitutional system has certain rights to appeal. He did, in fact, on his sentence that he was originally serving, appeal. Based upon that appeal through a lawful order of the Court he was released and he was a free man and I, therefore, think that any argument going toward A, is improper and that the State cannot show that he was under sentence of imprisonment at the time under the circumstances." (Emphasis added.) (AM-65-67)

Appellant submits that the above argument is sound in every respect. The term "under sentence of imprisonment" is not defined in Chapter 921, F.S. "Sentence" is defined

in Florida Rule of Criminal Procedure 3.700(a) as follows:

> "The term sentence means the pronouncement by the Court of the penalty imposed upon the defendant for the offense of which he has been adjudged guilty."

Whether a defendant is "under" such a sentence would depend upon the validity of the judgment supporting the sentence at the time the sentence was imposed. Cf. Anderson v. Chapman, 109 Fla. 54, 146 So. 675 (1933); Cauhn v. State, 98 Fla. 185, 122 So. 565 (1929).

There is nothing in the record to indicate that appellant was discharged upon bail while his case was being reviewed by the United States Supreme Court. He had received relief initially in Federal District Court and that judgment had been affirmed in the Fifth Circuit Court of Appeals. Unlike a defendant released in accordance with F.R.Cr.P. 3.820(b), appellant was apparently under no obligation to appear in court following further appellate review.

> "The aggravating circumstances of Fla.Stat. §921.141(6), F.S.A., actually define those crimes--when read in conjunction with Fla.Stat. §§782.04(1) and 794.01(1), F.S.A.--to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

> Considered in that vein, Fla.Stat. §921.141(6), subsections (a) and (b), F.S.A., prescribe the death penalty for a capital felony committed by a prisoner or by one previously convicted of a capital felony. These conditions represent two situations wherein the death penalty has been determined by the Legislature to be applicable, absent overriding mitigating factors." (Emphasis Added.)

How can a man released from prison pursuant to court order be considered a "prisoner"?

Defense counsel immediately objected when the prosecuting attorney urged the jury not to interpret "under sentence of imprisonment" to mean that such an aggravating circumstance is present only when the accused is "serving" a sentence (AM-12-18). The trial court erred when it allowed the State to give the jury an incorrect interpretation of Section 921.141(5)(a), F.S. and argue its application to the facts of this case. Since the jury did not specify in its verdict the aggravating and mitigating circumstances which it considered and found, the trial judge, and now this Court, can only speculate to divine the underlying basis of the verdict. Cf. Halliwell v. State, 323 So. 2d 557,561 (Fla., 1975): "We cannot read the minds of the jurors, but it is reasonable to suspect that the hidious and gruesome conduct of appellant in disemembering the body several hours after the murder probably was considered by the jury in recommending the death penalty."

That error was compounded when the trial court made specific reference to such "aggravating circumstance" in its findings of fact. Section 921.141(3), F.S. The trial court stated:

> "The Court finds as follows as to the aggravating circumstances: A. The crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment. ***" (S-15)

Just as it is impossible to determine what weight the jury gave to the "aggravating circumstance" of being "under sentence of imprisonment", it is impossible to determine what weight the trial judge gave to its finding of fact in that regard. This Court must now exercise its discretion in the "trifurcated" capital sentencing scheme, Alvord v. State, 322 So. 2d 533,524 n. 10 (Fla., 1975) (dissenting opinion of Mr. Justice England), and correct these errors by reducing the sentence to life imprisonment.

B. MITIGATING CIRCUMSTANCES OUTWEIGH AGGRAVATING CIRCUMSTANCES

Appellant respectfully submits that the trial judge "...in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute [Section 921.151, F.S.] and found in the record." Taylor v. State, 294 So. 2d 648, 651 (Fla., 1974).

Specifically, Section 921,141(6), F.S., lists as a mitigating circumstance: "(f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impared." The trial judge evidently failed to consider appellant's unrefuted statements that he consumed large quantities of beer and marijuana prior to the killing (TR-698,707,710,716,718,719).

One has to wonder whether appellant could "appreciate the criminality of his conduct" when sober, let alone when he was intoxicated. Appellant's description of his childhood and early confrontations with law enforcement authorities and his incarceration in penal and mental institutions appears to be a classic case of a sociopathic personality development (AM-6-10). Appellant recognizes that such a finding does not mean that the taking of Mrs. Smith's life was an excusable homicide. However, the Florida Legislature has directed that sich factors "shall" be considered in determining the sentence to be imposed in a capital case.

This Court has indicated on several occasions that it would independently review death penalty convictions so as to insure that the penalty would be applied "to only the most aggravated and unmitigated of most

serious crimes." State v. Dixon, infra, at 7; see also Thompson v. State, Case No. 45,107 (Fla.; opinion filed January 21, 1976), slip opinion at page 7; Songer v. State, infra, at 484. After such independent examination of the aggravating and mitigating factors in this case, appellant is confident that this Court will reach the same result that it reached in Swan v. State, 322 So. 2d 485 (Fla., 1975). There the defendant administered a "severe beating: to the victim before she died. This Court reduced the death sentence to life imprisonment. And in Halliwell v. State, 323 So. 2d 577 (Fla., 1975) this Court reversed the death sentence imposed upon a defendant who had been convicted of murdering his paramour's husband. He beat the victim to death with an iron bar and then hacked the body into several pieces. The jury in Halliwell recommended the death penalty.

For the foregoing reasons appellant submits that the trial court erred by imposing the death sentence in this case and this Court should therefore reduce the sentence to life imprisonment.

POINT VI

FLORIDA'S DEATH PENALTY VIOLATES CERTAIN PROVISIONS OF THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BECAUSE ARBITRARY, STANDARDLESS DISCRETION STILL EXISTS IN THE FORM OF PLEA BARGAINING, JURY FREEDOM TO CONVICT OF LESSER INCLUDED OFFENSES, AND EXECUTIVE CLEMENCY, AND IS INHERENTLY UNCONSTITUTIONAL IN THE LIGHT OF EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

Appellant recognizes that this Court passed upon the constitutionality of Florida's death penalty in State v. Dixon, 283 So. 2d 1 (Fla., 1973) and found it to be "...constitutional as measured by the controlling law of this State and under the constitutional test provided in Furman v. Georgia, [408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972)] Id. at 11. Since then this Court has considered the constitutional arguments presented in Dixon on several occasions, but has reaffirmed the Dixon holding each time. See, e.g., Alford v. State, 307 So. 2d 433 (Fla., 1975). Notwithstanding the above, appellant respectfully submits the following argument with the hope that this Court will re-examine those prior decisions. Appellant also wishes to preserve these constitutional points for subsequent appellant review, if such further review proves necessary.

A. STATUTORY AND JUDICIAL ARBITRARINESS

Florida's post-Furman capital sentencing procedure remains avowedly discretionary. In addition to this Court's pronouncements in Dixon, supra, at 8,9, this Court in Alvord v. State, 322 So. 2d 533,540 (Fla., 1975) stated that:

> "[t]he law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur [sic]. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment."

Again in Swan v. State, 322 So. 2d 485 (Fla., 1975), this Court construed F.R.Cr.Pr. 3.710, which provides that: "[i]n all cases in which the court has discretion as to what sentence may be imposed," it may require a presentence report. The Court ruled that "[s]ection 921.141, Florida Statutes, vests the trial court with the limited discretion to impose either the death penalty or life imprisonment...Thus, the discretionary nature of Section 921.141 brings it within the ambit of Rule 3.710." 322 So. 2d at 489.

The iteration of eight "aggravating" and seven "mitigating" circumstances in section 921.151, F.S., does not significantly confine, channel, or regularize capital sentencing discretion. This is so for several reasons.

For example, one of the statutory aggravating circumstances is that the crime is "especially heinous, atrocious, or cruel." Section 921.141(5)(h), F.S. This Court has attempted to limit the scope of that provision in State v. Dixon, supra, at 9. Other provisions have a similar wide scope. For example, the provision that "[t]he defendant knowingly created a great risk of death to many persons...." Section 921.141(5)(c), F.S. All first degree felony murder cases are automatically "aggravated" because section 921.141(5)(d), F.S., declares it to be an aggravating circumstance if first degree murder is committed in connection with each of the same felonies (except one) which formed the predicate for first degree felony murder under Section 782.04(1)(a), F.S. The excepted felony is heroin distribution; and killings in the perpretation of heroin distribution would presumably be "aggravated" under either "the great risk of death to many persons" provision, supra, or the "pecunary gain" provision of section 921.141(5)(f), F.S. Although the latter circumstance might be construed to be applied to "contract murder" killings, this Court has given it a much broader interpreation. In Hallman v. State, 305 So. 2d 180, 181 (Fla., 1974), for example, this Court affirmed a death penalty where the trial court had found this aggravating

circumstance, the homicide for which defendant Hallman had been convicted had occurred, however, during the course of a tavern robbery. Thus, this provision is potentially applicable to any slaying in which something of value is taken from the victim or the crime scene. And the subsection which designates an "aggravating circumstance" the fact that the "capital felony" of sexual battery of a person under 11 occurred "in the commission of, or in attempt to commit, ... rape," section 921.141(5)(d), F.S., clearly aggravates any sexual assault made potentially capital by section 794.011(2), F.S.

But the amplitude of the statutory aggravating circumstances does not alone count for the broad and unpredictable capital liability established by section 921.141, F.S. This Court has declared that "the most important safeguard provided by Fla.Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." Alford v. State, supra, at 444; see also State v. Dixon, supra, at 8. However, it has simultaneously rendered this "safeguard" altogether nugatory by holding that a death sentence may be imposed on the basis of aggravating circumstances not specified in section 921.141 F.S. In Sawyer v. State, 313 So. 2d 680 (Fla., 1975), the trial court overruled a jury recommendation of life sentence for first degree murder and condemned the defendant. The trial judge's

opinion listed six "'additional facts which the jury did not have during their deliberation on the advisory sentence,'" 313 So. 2d at 681, to justify the imposition of the death sentence. This Court recast these findings in terms of "aggravating circumstances" - although not the "aggravating circumstances" iterated in section 921.141, F.S. - and affirmed defendant Sawyer's death sentence. The number and nature of factors in aggravation which the jury and the trial judge may consider is thus totally unlimited.

The statutory aggravating circumstances are as vague and amorphous as they are broad. This Court candidly recognized in State v. Dixon, supra, at 6, that "[t]o a layman, no capital crime may appear to be less than heinous." Subsequent Court opinions have not improved upon this Court's attempt to define that word in Dixon. "[W]e believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d 908,910 (Fla., 1975). See, e.g., Halliwell v. State, 323 So. 2d 557, 561 (Fla., 1975), where this Court stated:

> "The mutilation of the body many hours later [after the killing] was not primarily the kind of misconduct contemplated by the Legislature in providing for the consideration of [the 'expecially heinous, atrocious, or cruel'] aggravating circumstance. If mutilation had occurred

> prior to death or instantly thereafter it would have been more relevant in fixing the death penalty." (Emphasis added.)

Likewise, the mitigating circumstances enumerated in section 921.141(6), F.S., are equally viscous. Concerning the provisions that "[t]he age of the defendant at the time of the crime" may be a "mitigating circumstance" this Court has written:

> "The Legislature has chosen to provide for consideration of the age of the defendant - whether youthful, middle age, or aged - in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague and we cannot say that such a consideration is unreasonable per se. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court." State v. Dixon, supra, at 10. (Emphasis added.)

Concerning the mitigation circumstance that "[t]he defendant has no significant history of prior criminal activity," it should be noted that (1) this Court apparently approved a finding that one breaking and entering conviction "primarily negated" this circumstance, Proffitt v. State, 315 So. 2d 461, 465 (Fla., 1975); and a defendant's "significant history of prior criminal activity" may (but need not) be used alternatively as a nonstatutory aggravating circumstance as in Sawyer v. State, supra at 681 where this Court treated

criminal charges (not convictions) pending against the defendant as "aggravating". In State v. Dixon, supra, at 9, this Court held that aggravating circumstances must be proven by the State beyond a reasonable doubt. However, the Court has not allocated or defined the burden of proof with regard to mitigating circumstances and advisory sentencing juries and trial courts are left "free to exercise unguarded discretion when finding mitigating circumstances." Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla.St.L.Rev. 108,141 (1974).

The manner in which "aggravating" and "mitigating" circumstances will be weighed and combined in the sentencing process is left to the undirected discretion of jurors and trial judges. Since the process of appraising "aggravating" and "mitigating" circumstances is entirely undirected, one trial judge may treat a particular aggravating factor as "sufficient" to outweigh three or four designated mitigating factors while another judge chooses to weigh the identical circumstances obversely. The same circumstances - or rationally undifferentiable circumstances - may be taken as a "sufficient" basis for death sentence in one courtroom, and as insufficient in another room or on another day.

Indeed, Florida's 1972 Statutory Capital Sentencing

Procedure is more arbitrary and capricious than its pre-Furman death sentencing system because (1) sentencing discretion is more broadly disseminated, with no single participant in the process possessing ultimate responsibility for the life-or-death decision and (2) additional uncertainties are injected into the sentencing process by the provision for an "advisory" jury verdict concerning the sentence. See State v. Dixon, supra, at 26. (Dissenting opinion of Mr. Justice Boyd). Manifestly, Florida's "trifurcated death penalty statute" Tedder v. State, 322 So. 2d 908,910 (Fla., 1975), has merely compounded the uncertainties of capital sentencing.

Since the jury does not specify in its verdict the aggravating and mitigating circumstances which it has considered and found, it is impossible for a trial court to relate the verdict to the sentencing scheme contained in the governing statute. The jury's sentencing recommendation is an enigmatic "yes" or "no" on the question of whether a capital defendant should be killed, and the trial judge must speculate to devine the underlying basis of the verdict. There is no meaningful communication between the advisory jury and the sentencing judge as to the facts that the jury has found, discounted, treated as "aggravating", treated as "mitigating", rightly or wrongly considered

important or dismissed as irrelevant. Cf., Halliwell v. State, 323 So. 2d 557, 561 (Fla., 1975): "We cannot read the minds of jurors, but it is reasonable to suspect that the hideous and gruesome conduct of appellant in dismembering the body several hours after the murder probably was considered by the jury in recommending the death penalty."

It is uncertain what weight the trial judge is to give to the jury's advisory sentencing verdict. "In some instances [the advisory verdict]...could be a critical factor in determining whether or not the death penalty should be imposed," LaMadeline v. State, 303 So. 2d 17, 20 (Fla., 1974); but presumably, in other undefined circumstances, it is not. In Tedder v. State, supra, at 910, this Court declared:

> "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

But the Tedder "standard" has been as frequently ignored as used. In neither Sawyer v. State, 313 So. 2d 680 (Fla., 1975), nor Gardner v. State, 313 So. 2d 675 (Fla., 1975), can it be said that "the facts suggesting a sentence of death...[are] so clear and convincing that virtually no reasonable person could differ" with the trial judge's

overruling of a jury's recommendation of mercy. In Dobbert v. State, Case No. 45,558 (Fla.; opinion filed January 14, 1976), the defendant was convicted of first degree murder of his nine year old daughter, the second degree murder of his seven year old son, and the child abuse of two other of his children. The jury recommended a life sentence on the first degree murder count; the trial judge imposed a death sentence; and the majority of the Florida Supreme Court affirmed. Mr. Justice England declared in dissent that he would have reversed that sentence on the basis of Tedder: "Applying that standard here, I would hold that reasonable persons could disagree with the trial judge and that the jury's recommendation of life imprisonment should be adopted." Dobbert v. State, supra, slip opinion at page 21. The majority in Dobbert did not cite Tedder; and Mr. Justice Overton wrote separately to say that he had applied the Tedder standard and found it met, State v. Dobbert, supra, slip opinion ag page 20. Cf., Swan v. State, supra. Of course, an intractable difficulty in making the kind of assessment implied in Tedder is that it is not possible for a trial court to know "the facts" which the jury found, considered, or rejected.

The relationship between the jury's recommendation and the trial court's sentence is further complicated by the fact

that a pre-sentence investigation report may be prepared - or may not, as the judge chooses - after the jury's advisory verdict, and may form a part of the factual basis on which the final life or death decision is based. Cf., Huie, The Execution of Private Solvik, 172-173 (5th Dell. ed. 1974).

Finally, this Court's role in the determination of whether or not to affirm a death sentence is as arbitrary as any of the trial court's acts preceeding final judicial review. As conceived in State v. Dixon, supra, this appellate review is intended to provide one of several "concrete safeguards beyond those of the trial system to protect [a defendant] ... from death when a less harsh punishment might be sufficient." Id. at 7. No statutory standards of appellate review are provided and this Court has reviewed the death sentence on both procedural and substantive grounds. In Songer v. State, 322 So. 2d 481, 484 (Fla., 1975), the Court emphasized that "[w]hen the death sentence has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted." Thus, in Taylor v. State, 294 So. 2d 648, 651 (Fla., 1974), this Court ruled: "From our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances

enumerated by the statute and found in the record."

This Court has adopted a number of vague, somewhat differing tests, to determine whether a sentence of death is "warranted" in particular cases. In State v. Dixon, supra, at 7, the Court defined its role as assuring that the death penalty would be applied "to only the most aggravated and unmitigated of most serious crimes." In Thompson v. State, Case No. 45,107 (Fla.; opinion filed January 21, 1976), the Court repeated "that it was the legislative intent to extract [sic] the penalty of death for only the most aggravated and the most indefensable of crimes." Slip opinion at page 7. In Halliwell v. State, supra, at 561, it indicated that on the appeal of a death sentence, it would "[a]s required by statute...weig[h] both the aggravating and the mitigating circumstances as shown in the record." This approach was taken also in Swan v. State, supra, at 489, where the Court avowedly engaged in a plenary weighing of sentencing factors: "[h]aving considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty." The court had earlier examined the record to discern whether "[t]he State offered ...[anything] to show the necessity for electrocution. 322 So. 2d at 488 (emphasis added). Yet, in Thompson v. State, Case No. 45,107 (Fla.; opinion filed January 21, 1976),

this Court concluded only that it "[found] no objection to the jury's determination," slip opinion at page 7. The formulation in Alvord v. State, 322 So. 2d 533, 540 (Fla., 1975), was that "[i]t is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment was too great."

Appellant respectfully submits that no standards of appellate review have emerged from the several cases in which this Court has reviewed death penalties imposed under the new statute. Out of the 19 cases in which this Court has reviewed death penalties as of the date of this writing, all that is clear is that the Court has affirmed 12 death sentences and has reversed 7 death sentences. None of its written opinions for affirmance assays the slightest explanation of why "a less harsh penalty [is not]... sufficient," State v. Dixon, supra, 283 So. 2d at 7; nor has the Court offered the meagerest explication of any other reasoned principle of decision. Without the articulation of any standards, without the enunciation of a reasoned opinion on the sentence in question, without analysis of the significance of factual elements thought to justify (or not to justify) the sentence under review, it is far from apparent how this Court can assure that the

death sentence is being "inflicted for only the most aggravated, the most indefensable of crimes." Id. at 7. Cf., Alvord v. State, supra, at 541-542 (Mr. Justice England dissenting). In support of the foregoing allegations, appellant observes how past decisions have resulted in different holdings in cases which were factually similar.

1. This Court affirmed a death sentence in Gardner v. State, 313 So. 2d 675 (Fla., 1975), where appellant, in a drunken stupor, brutely beat his wife to death. The evidence revealed that appellant had been drinking heavily for the 24 hours before the killing, that he fell asleep with his wife's dead body, and that he sought help for her the next morning "because his wife did not appear to be breathing properly," 313 So. 2d at 679, that he made no attempt to escape, and that he exhibited remorse upon learning that his wife was dead. See 313 So. 2d at 678-679. The jury recommended mercy, but this Court affirmed the trial court's imposition of the death sentence. In dissent, Mr. Justice Ervin declared, "I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the

the death penalty in this state. *** [T]his case involv[es] a crime of passion in a drunken spree." 313 2d at 679. This Court apparently discovered the force of Mr. Justice Ervin's point in Tedder v. State, 322 So. 2d 908 (Fla., 1975), where it reversed the death penalty imposed upon a defendant (the trial court had overruled the advisory jury's verdict of mercy) who had fired several shots at his wife and mother-in-law during a marital dispute and killed the mother-in-law. Notably, this defendant had taken his wife away at gun point from her wounded mother: [a]s they left, his wife saw her mother lying on the floor in a hallway. Appellant would not permit his wife to examine the body." Tedder v. State, supra, at 909.

2. Gardner involved a gruesome beating, to be sure. But in Swan v. State, supra, this Court vacated a death penalty imposed upon a burglar who, with a confederate, had administered a fatal "severe beating," 322 So. 2d at 486, and "torture," 322 So. 2d at 478, to a 49 year old female housekeeper who was in poor health. And in Halliwell v. State, supra, this Court reversed a death sentence imposed upon a defendant who had been convicted of murdering his paramour's husband. Defendant had beaten the victim to death with one iron bar and had then hacked the body into several pieces. The death penalty imposed following a jury

recommendation of death was overruled upon a finding that "premediated murder [was justified], but we see nothing more shocking in the actual killing [as distinguished from the subsequent dismemberment] then in a majority of murder cases reviewed by this Court." 323 So. 2d at 561.

3. The facts of Taylor v. State, supra, and Sawyer v. State, supra, unquestionably differ in some regards (as do the facts in any two cases), but the differences hardly seem commensurate with differences between life and death. In both cases, black defendants were convicted of slaying white liquor store clerks during the course of an armed robbery. In both cases, more than one armed robber participated in the crime, and there was possible resistance by the store personnel. In neither case was it established that the defendant intentially shot the victim. In both cases, the sentencing juries unanimously recommended life imprisonment, and the trial court imposed the death penalty. Yet in one case, this Court reversed the death penalty, and in the other, it affirmed the trial court's sentence on the basis of "aggravating circumstances" not specified in the Florida Capital Punishment Statute.

4. Again, this Court vacated a death penalty in Halliwell v. State, supra, imposed for a gruesome slaying found by the trial court to be "especially heinous,

atrocious, or cruel" and found by the advisory jury to be deserving of death. This court affirmed a death penalty in Spinkellink v. State, 313 So. 2d 666 (Fla., 1975), on the basis of a similar finding by the trial court and recommendation by the jury in a less aggravated case where there had been considerable provocation for the killing. In Spinkellink, the defendant had picked up the deceased, who was hitchhiking; "both men had criminal records, and both were heavy drinkers." 313 So. 2d at 668. "During their travels appellant [Spinkellink] learned first hand of Szymankiewicz's [the deceased's] vicious propensities when the latter forced him to have homosexual relations with him, and the latter played 'Russian Roulette' with him and boasted of killing a fellow inmate while in prison. After checking into a motel in Tallahassee, appellant [Spinkellink] discovered that his travelling companion had releaved him of his cash reserves." Ibid. Spinkellink returned to recover his money, and Szymankiewicz was later found dead in the motel room, shot twice with his own pistol, perhaps while sleeping. Spinkellink was subsequently convicted of Szymankiewicz's murder. Ibid. This Court noted that "while admitting that he had fired the gun that killed Szymankiewicz appellant [Spinkellink] sought to show mitigating circumstances by showing, first,

that he was carrying the gun [of Szymankiewicz] because he was afraid of his own life, and secondly, that the gun discharged during a fight between the two." Ibid. Although this Court stated that "[a]dmittedly, the evidence clearly shows that the deceased was an individual of vicious temperment and that Appellant [Spinkellink] was justified in concluding that he would do well to sever their relationship," 313 So. 2d at 670, it rejected Spinkellink's claim that the factual circumstances of his relationship with the deceased and his putative self-defense claim established any mitigating circumstances.

B. PLEA BARGAINING

Furthermore, the State Attorney's discretion to plea bargain is utterly unfettered by the 1972 capital punishment statute or by any other significant restrictions. F.R.Cr.Pr. 3.170(g) expressively authorizes plea bargaining. Rule 3.171 (a) provides that "[t]he Prosecuting Attorney is encouraged to discuss and agree on pleas which may be entered by a defendant." A trial court's power to reject a guilty plea is limited to those cases where the plea is "not 'entirely voluntary by one competent to know the consequences,' or is 'induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance.'" Reyes v. Kelly, 224 So. 2d 303,

305 (Fla., 1969).

Plea bargaining is frequent in capital cases, and this Court has stated that when a defendant "plead[s] guilty in order to escape the electric chair," he gets "what he bargained for - a life sentence and ... no right to complain." Lewis v. State, 93 So. 2d 46, 47 (Fla., 1956). Without guidance or restriction - subject only to defendants' willingness to negotiate - a State Attorney is free to make the decision whether a capital charge will be pursued or bargined out. No procedures exist to restrain the employment by different State Attorneys of differing standards for the acceptance of less than capital guilty pleas, or to monitor or to correct the inconsistent or capriviously applied policy of an individual State Attorney.

C. EXECUTIVE CLEMENCY

The Governor, with the "approval of three members of the cabinet" may by executive order commute a death sentence of a sentence of life imprisonment. Although Florida Governors must report their grants of clemency to the legislature, there are no standards whatsoever for the exercise of the commutation power. The reduction of a legally autnorized sentence is committed to the unfettered

discretion of the executive branch. Davis v. State, 123 So. 2d 703, 711 (Fla., 1960); LaBarbera v. State, 63 So. 2d 654, 655 (Fla., 1953). The power of the governor to commute a death sentence has been likened to the power of a pre-Furman jury to make a recommendation of mercy in any capital case. Baker v. State, 137 Fla. 27, 188 So. 2d 634 (1939).

Florida law from indictment to electrocution is "honeycomed with discretion," White, The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment, 45 Am.J. Orthopsychiatry 581, 587 (1975). The result is an inevitable arbitrary infliction of the harshest punishment known to man. See Black, Capital Punishment, The Inevitability of Caprice and Mistake, 47 (1974).

D. UNCONSTITUTIONAL PER SE

Finally, in addition to the question whether the capital punishment statute has successfully eliminated arbitrary selectivity in the imposition of the death penalty, a significant question is presented as to whether the penalty is per se inconsistent with contemporary standards of decency embodied in the Eighth Amendment. The death penalty is not consistent with "evolving standards of decency that mark the progress of a maturing

society." Trop v. Dulles, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed. 2d 630 (1958).

VI CONCLUSION

Wherefore, appellant respectfully requests that this Court vacate the judgment and sentence for the reasons set forth under Points I through IV or vacate the sentence only for the reasons set forth under Points V and VI. If this Court is in agreement with the argument set forth under Point IV, decisional law would appear to mandate a discharge. Appellant hereby seeks whatever relief this Court deems appropriate under the circumstances.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by hand to Honorable Robert Shevin, Attorney General, The Capitol, Tallahassee, Florida, and by mail to Mr. Raymond R. Stone, #B-010236, Post Office Box 747, Starke, Florida, 32091, this 5th day of April, 1976.

DAVID J. BUSCH

IN THE SUPREME COURT OF FLORIDA

RAYMOND R. STONE,

Appellant,

v. CASE NO. 48,275

STATE OF FLORIDA,

Appellee.

Docketed
10-31-77
Florida Attorney
General

SUPPLEMENTAL BRIEF OF APPELLANT

RECEIVED
OCT 31 1977
ATTORNEY GENERALS OFFICE

DAVID J. BUSCH
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
P.O. BOX 671
TALLAHASSEE, FL 32302

COUNSEL FOR APPELLANT

TOPICAL INDEX

	PAGE
TOPICAL INDEX	i
AUTHORITIES CITED	ii
I PRELIMINARY STATEMENT	1
II POINTS ON APPEAL	2
III ARUGMENT	3-13
CERTIFICATE OF SERVICE	14

AUTHORITIES CITED

CASES	PAGES
Alvord v. State, 322 So.2d 533, 538 (Fla. 1975)	12
Huckaby v. State, 343 So.2d 29 (Fla. 1977)	12
Jones v. State, 332 So.2d 615 (Fla. 1976)	12
Messer v. State, 330 So.2d 137 (Fla. 1976)	8,11,13
Miller v. State, 332 So.2d 65 (Fla. 1976)	8,11
State v. Dixon, 283 So.2d 1 (Fla. 1973)	7
STATUTES AND CONSTITUTIONS	
Section 921.141(1), Florida Statutes	13
Florida Constitution	2,3
United States Constitution	2,3
MISCELLANEOUS	
Fla. App. Rule 6.16b	11

IN THE SUPREME COURT OF FLORIDA

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Appellant,	:	
v.	:	CASE NO. 48,275
STATE OF FLORIDA,	:	
Appellee.	:	

SUPPLEMENTAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

On June 24, 1977, this Court entered an order directing that the trial court furnish this Court with "any presentence investigation, juvenile case file information, psychiatric reports, or otherwise, which were before it for consideration in imposing sentence". On September 19, 1977, the trial court forwarded copies of various reports of psychiatric examinations which it considered before imposing sentence. On September 28, 1977, at the request of appellant, this Court entered an order allowing him to file a supplemental brief addressing the contents of the reports as they relate to Point V(C) of appellant's main brief.

II POINTS ON APPEAL

APPELLANT WAS DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WHEN THE TRIAL COURT:

* * *

(C) ABUSED ITS DISCRETION BY IMPOSING A DEATH SENTENCE WHEN THE AGGRAVATING CIRCUMSTANCES DID NOT OUTWEIGH THE MITIGATING CIRCUMSTANCES IN ACCORDANCE WITH THIS COURT'S INTERPRETATIONS OF THE CAPITAL SENTENCING SCHEME.

III ARGUMENT

APPELLANT WAS DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND A FAIR TRIAL WITHIN THE MEANING OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WHEN THE TRIAL COURT:

* * *

(C) ABUSED ITS DISCRETION BY IMPOSING A DEATH SENTENCE WHEN THE AGGRAVATING CIRCUMSTANCES DID NOT OUTWEIGH THE MITIGATING CIRCUMSTANCES IN ACCORDANCE WITH THIS COURT'S INTERPRETATIONS OF THE CAPITAL SENTENCING SCHEME.

On July 18, 1975, a majority of the jury recommended that appellant be sentenced to death. Its recommendation followed the sentencing portion of the bifurcated trial where the only witness to testify was appellant (AM-6-11). In a scant five pages of transcribed testimony appellant briefly related his wretched history of psychiatric and penal treatment from the time he was 12 years old up until his 36th year.

The record now reflects that on August 26 and September 2, 1975, appellant's trial counsel, Gary R. Dunham, forwarded copies of psychiatric reports to the trial court.

The report of the Farmington State Hospital indicates that appellant was admitted to that institution on June 8, 1955, from the Boonville State Training School "for observation". At that time appellant was using the alias "Walter

Herron". The treatment sheet indicates that after three months in that institution appellant was given five electro-shock treatments and then returned to the Boonville Juvenile Institution.

Under the "Anamnesis" heading of the Farmington Hospital report there is presented a case history of appellant that includes an incident that occurred when he was an 11 year old child. It appears that he and two other boys bound another child and threw the child into a river where he drowned. It was for that act that appellant was sentenced to the Boonville Training School for an interminate period. Other juvenile behavior problems are noted in the report. Appellant's childhood must have been a nightmare. As stated in the report:

> "There is also a sordid history of sexual aberration consisting primarily of fellatio in which the patient was the active participant or else mutual participation occurred. It is reported that his father used the patient to perform such acts on him, the father, probably even teaching him the practice. He has admitted being involved with other men including several while in jail awaiting sentence. He has also admitted involvement at the training school. He apparently gets cigarettes and candy as rewards.
>
> Walter was never in court, or any correctional institution, or any hospital, before his difficulty

approximately four and a half years ago.

Family History: The father is approximately 65 years of age, shiftless, lives on A.D.C., attempted to raise his family in the back of a truck which had been boarded up with a small box on top of the truck cab serving as a bedroom for the children. He is guilty of such immoral acts as having sexual relations with various woman in front of his children.

We have no information regarding the mother.

Walter is the fourth of six siblings of both sexes. The oldest brother is or has been in a penitentiary in Mississippi.

Personal History: We have no information regarding the patient's birth or early development. His childhood was spent as previously described, that is, living with his family in a truck and generally being dirty and ill-fed. His father made him and several of the other children work while he enjoyed the profit from their labor. The only information we have regarding the patient's mother is the single statement that she died seven years ago. At this time Walter would have been nine years of age."

The prognosis portion of the report states:

"We have little if anything to offer this boy."

Three years later appellant was admitted to the Fulton State Hospital, also located in Missouri. He was transferred there from the penitentiary at Jefferson

City. In his written report at the hospital Dr. Satterfield noted:

> "The boy has been the victim of a very bad family situation and an unbelievable variety of sociopathic experiences. At the present time, he comes at the age of 18 with a characteristic choking-back of his intellictual development. Although not too unintelligent, he is completely ignorant. His social training and his social acquisitions have been all on the barest practical level and much of the alley-society type of social relating. It is not considered that the boy has had an opportunity to form any superego ideals; on the contrary, he is cynical, entirely self-interested and devoted, and has no knowledge of inter personal affection or any of the more complicated inter-personal emotional relationships. He seems to be skilled only in making his way on a mendatious and dishonest activity level."

The diagnostic impression of clinical psychologist Lyman M. Riegel states:

> "Sociopathic youth from a deprived and depraved environment whose basic trust in others is so low that the possibility of an uneventful adjustment is considered very doubtful. He is considered to be of low average intelligence and in good contact with reality; however, his stated and perhaps fantasized revenge motives towards individuals and society are so malignant that he may constitute a grave danger to others upon his release from custody."

The jury never had the benefit of these reports. The

trial court reviewed them and, notwithstanding the contents, found:

> "* * *
>
> B. The capital felony for which the Defendant was convicted was not committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> * * *
>
> [E] the Defendant did not act under extreme duress during the commission of the offense nor was he during that period of time under the substantial domination of another person. F. At the time of the commission of the offense, the Defendant's capacity to appreciate the criminality [of his conduct or to conform his conduct] to the requirements of the law was not substantially impaired." (AM-16,17).

In State v. Dixon, 283 So.2d 1 (Fla. 1973) this Court stated, regarding mental disturbance of one convicted of a capital offense:

> "Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla. Stat. Section 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.
>
> * * *
>
> Mental disturbance which interferes but does not obviate the defendant's knowledge of right and wrong may also be

considered as a mitigating circumstance. Fla. Stat. § 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." Id. at 10.

In the cases of Messer v. State, 330 So.2d 137 (Fla. 1976) and Miller v. State, 332 So.2d 65 (Fla. 1976) this Court reviewed captial offenses where the defendants had histories of mental disturbance. In both cases the defense counsel were prohibited from presenting psychiatric testimony at the sentencing portion of the bifurcated trials. In Messer this Court stated:

> "Additionally, we believe counsel for the defendant was effectively deprived of establishing an important mitigating circumstance when he was not afforded the opportunity to present psychiatric testimony to the jury during the sentencing portion of the proceedings. Subsection 921.-141(6)(b), Florida Statutes, provides as a mitigating circumstance that '[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.' Counsel for the appellant represented to the court that, if given the opportunity, he would come forward with evidence establishing such condition. The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative

intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation. Subsection 921.141(1), Florida Statutes, provides in part:

> '. . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6)[sic] and (7)[sic] [of this section]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. . . .'

The quoted language indicates that the circuit judge should exercise the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations.

[6] Accordingly, we are compelled to the conclusion that this cause should be remanded to the trial court for the purpose of conducting another sentencing hearing before a jury impaneled for that purpose at which the

the evidence improperly excluded may be considered. We recognize that this will result in a hearing before a different jury from that which heard the evidence upon which the verdict of guilty was rendered. However, we find authority for such procedure in that portion of Subsection 921.141(1), Florida Statutes, which states:

> '. . . If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. . . .'

Also, by Chapter 74-379, Laws of Florida, effective October 1, 1974, the following language was added to Subsection 921.141 (1), Florida Statutes:

> '. . . If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. . . .'

Even though the last-quoted provision was not in effect at the time of the offense or at the time the appellant was indicted, it buttresses our conclusion that the proper course in this analogous situation is to impanel a special jury to consider the evidence of aggravating and mi-

> tigating circumstances and make its recommendation to the trial court for proper sentencing pursuant to Section 921.141, Florida Statutes." Messer v. State, supra, at 142,143.

Cf. Miller v. State, supra, at 68. Although defense counsel here does not appear to have been prohibited from presenting this critical psychiatric evidence at trial, the record now reflects that he did not have the reports in hand until after the trial. The cover letter accompanying the Farmington State Hospital records signed by Mary Schwartz is dated August 29, 1975. The cover letter accompanying the Fulton State Hospital report signed by Eva Sims is dated August 11, 1975. Fla. App. Rule 6.16b provides, in part:

> "Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

Surely the "interests of justice" require a new sentencing hearing in this instance. The reports contain crucial information regarding appellant's background and mental health. Such evidence "which may be inadmissible in a trial on guilt may be admissible and relevant to enable a jury to make an informed recommendation based on the aggravating and mitiga-

ting circumstances concerning the acts committed." Alvord v. State, 322 So.2d 533, 538 (Fla. 1975). "There should not be a narrow application of interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence." Id. at 539.

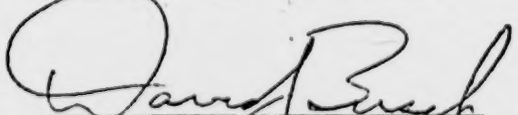
Appellant does not understand how the trial court could find no mitigating circumstances in view of appellant's testimony regarding his history of mental illness as supported by the psychiatric reports. As in Huckaby v. State, 343 So.2d 29 (Fla. 1977), the record reveals a man with a long history of mental illness. It seems incredible that the record does not contain any motions or orders for psychiatric examinations prior to trial or disposition of the case. Appellant is a testbook case for forensic psychiatrists. As in Huckaby, "While he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired". Id. at 34. In Jones v. State, 332 So.2d 615 (Fla. 1976) the jury had an opportunity to examine two psychiatric reports showing that the defendant suffered from a chronic paranoid schizophrenic illness associated with alcoholic addiction. There the jury unanimously recommended that

the death sentence not be imposed, but the trial court ruled otherwise. In reviewing the sentence of death this Court stated:

> "The testimony makes it clear that appellant suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder is not fully known, but it is reasonable to assume that this mental illness contributed to his strange behavior. Extreme emotional conditions of defendants in murder cases can be a basis for mitigating punishment."

The jury in appellant's case did not have the benefit of any psychiatric reports or testimony. This Court, however, as part of its "trifurcated" capital sentencing review scheme, should vacate the sentence of death and impose a life sentence without eligibility for parole for 25 years. Alternatively, it should remand the cause with directions that a special jury be impanled as allowed by § 921.141(1), Florida Statutes (Messer v. State, supra, at 142) to consider further evidence of aggravating and mitigating circumstances.

Respectfully submitted,



DAVID J. BUSCH
Assistant Public Defender
Second Judicial Circuit

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental Brief of Appellant has been hand delivered to Mr. Charles W. Musgrove, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Mr. Raymond R. Stone, #B-010236, Florida State Prison, P.O. Box 747, Starke, FL 32091, this 31st day of October, 1977.

DAVID J. BUSCH

C

IN THE SUPREME COURT OF FLORIDA

RAYMOND R. STONE, :

Appellant, :

v. : CASE NO. 48,275

STATE OF FLORIDA, :

Appellee. :

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Florida Attorney General

APPENDIX TO SUPPLEMENTAL BRIEF OF APPELLANT

DAVID J. BUSCH
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October 27, 19

David H. Busch, Esquire
Assistant Public Defender
Appellate Division
Public Defenders Office
Post Office Box 671
Tallahassee, Florida 32302

RE: State v. Raymond R. Stone
Union County Case No. 74-71

Dear Mr. Busch:

After speaking with you on the telephone on Tuesday, October 25, 1977, I went back to the files of the Public Defenders Office here in Gainesville to determine the information you requested in the above-referenced case.

Please be advised that the record shows that no Motion for psychiatric evaluation was filed in the pre-trial process of Mr. Stone's case.

I am enclosing copies of the letter of mine to the prison officials dated November 21, 1974, requesting psychiatric information and response from a medical records supervisor, dated September 23, 1974.

Apparently, I was attempting to determine whether or not there was sufficient cause to file a Motion for psychiatric evaluation. I do recall that Mr. Stone was quite vague as to his past hospitalization, and I think I recall that the information was not received until I became aware that he had previously been known as Walter Herron through his F.B.I. rap sheet. As best I can tell, none of the information about his past psychiatric hospitalization came to my attention until after the trial but prior to the sentencing.

I wish I could be of more help since I am very concerned about the death penalty imposed on Mr. Stone. Please advise me if there is anything further I can do.

Sincerely,

Gary R. Dunham

/amc
cc Hon. Alan Parlapaiano

Office Of
PUBLIC DEFENDER
Eighth Judicial Circuit
317 NE 1st Street, Gainesville, Florida 32601

MACK S. FUTCH
Public Defender

Telephone 376-5286
P. O. Box 1063

November 21, 1974

Chief Medical Librarian
Lake Butler Reception &
Medical Center
Lake Butler, Florida

RE: Raymond R. Stone
Prison #010236

Dear Sir:

Enclosed is a Medical Release Form signed by Mr. Stone who is now an inmate at Florida State Prison. As you may know, Mr. Stone was indicted by a Grand Jury in Union County in late October of this year charged with Murder in the First Degree.

It is my understanding that Mr. Stone has a history of psychiatric problems and that he has been institutionalized in State Mental Hospitals in other states.

I would appreciate your forwarding to me any pertinent medical records that you might have in his files in order that I may determine the extent of his past medical history, especially insofar as emotional and/or psychological impairment.

If you can not oblige, I would appreciate your forwarding this letter, along with the enclosed Medical Release Form, to one of the psychiatrists on the staff of the Division of Corrections at the Raiford Complex. Please show him this letter and explain that I would appreciate his forwarding a letter with a summary of the Defendant's past medical history, the location of any mental hospitals he has been in and the results of the most recent evaluation of his mental and emotional state.

Your cooperation will be greatly appreciated.

Sincerely,

Gary R. Dunham
Assistant Public Defender

GRD:kch
enclosure

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES
Emmett S. Roberts

STATE OF FLORIDA
Reubin O'D Askew, Governor

FLORIDA STATE PRISON – POST OFFICE BOX 747 – STARKE, FLORIDA 32091

Louie L. Wainwright—Director

R.O. Massey
Superintendent

December 23, 1974

Mr. Gary R. Dunham
Assistant Public Defender
Eighth Judicial Circuit
317 North East First Street
Gainesville, Florida 32601

Dear Sir:

Your letter was forwarded to Florida State Prison, Starke, from the Reception and Medical Center in Lake Butler, in reference to Raymond R. Stone, DC# 010236.

Inmate Stone's medical records indicate that he has never been seen nor had any psychiatric or psychological problems while at this institution.

Sincerely,

G. S. FORTNER, SUPERINTENDENT

D. A. Riggs
Medical Technician Supervisor

DAR:lg

cc: File

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to Mr. Charles W. Musgrove, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, Mr. Raymond R. Stone, #B-010236, Florida State Prison, P.O. Box 747, Starke, FL 32091, this 1st day of November, 1977.

DAVID J. BUSCH